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FOURTH REPORT ON STATE RESPONSIBILITY

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INTRODUCTION

1. The object of the present document is to submit solutions and draft articles on the various aspects of the legal regime of countermeasures as identified and illustrated in the previous (third) report. 1/ Solutions and draft articles are based, as announced, on the further study of practice and doctrine.

1/ Third report on State responsibility, doc. A/CN.4/440 and Add. 1.

CHAPTER I. CONDITIONS AND FUNCTIONS OF COUNTERMEASURES

A. Existence of an internationally wrongful act as a basic condition

2. Of course, as explained in the previous report, 2/ the very basic requirement for any countermeasure lawfully to be resorted to is the actual existence of an internationally wrongful act infringing a right of the reacting State. This does not mean, subject to any relevant provisions of existing dispute settlement instruments (infra Chapter Two, especially paras. 16-26), that the existence of such an act and the allegedly injured State's right to take countermeasures should have been the object of a prior determination by an arbitral or judicial procedure or subject to any kind of action of a political or fact-finding body. Nor does it mean that the presence of an internationally wrongful act should have been the object of a prior agreement between the allegedly injured State and the alleged law-breaker. On the other hand, it would not be sufficient for the allegedly injured State to believe in good faith that an internationally wrongful act has been committed in violation of its right. Any State resorting to countermeasures on the basis of any such presumption of wrongfulness of the other party's conduct will do so at its own risk. The risk would be - for the allegedly injured State - to be held responsible for an internationally wrongful act whenever the alleged prior violation were proved not to have occurred or not to be in violation of its right. All that can be said in such a case is that the good faith or excusable error of an allegedly injured State which had resorted to countermeasures in the absence of any prior internationally wrongful act would obviously be relevant in evaluating the said State's degree of responsibility.

B. The function of countermeasures

3. A further point to be considered is the function which general international law assigns and our draft articles should assign to countermeasures. 3/ The study of international practice seems to indicate that in resorting to countermeasures injured States affirm that they are seeking and indeed appear to seek cessation of the wrongful conduct (in case of a wrongful act having a continuing character) and/or reparation in a broad sense (possibly inclusive of satisfaction) and/or guarantees of non-repetition. 4/ In other words, the function of countermeasures would not go beyond the pursuit by the injured State, either of cessation of the wrongful conduct and guarantees of non-repetition in the interest of the protection of the so-called "primary" legal relationship, or of naturalis restitutio, pecuniary compensation, and the various forms of satisfaction in order to wipe out the injurious consequences - material or moral - of the infringement of the said relationship. No other aims being lawfully pursuable, any countermeasure the functions of which were to go beyond the

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2/ Third report, cit., paragraphs 37-38.

3/ Third report, cit., paragraphs 39-45.

4/ The practice referred to in the text is considered throughout the present document and the addendum thereto.

said ends would be in its turn, according to the said indications of international practice, an unlawful act. This is presumably the point that the International Law Institute (ILI) intended to make when it emphasized, in its well-known 1934 resolution on reprisals, that an injured State should not "détourner les représailles du bout qui en a déterminé initialement l'usage" [deflect reprisals from the object for which they were first intended to be used] (art. 6, para. 5). 5/ It would follow in particular that in no case could actions or omissions lawfully be taken by an injured State as countermeasures in order to inflict punishment upon the State which committed the internationally wrongful act. The only punishment lawfully suffered by the latter State would be the material or moral damage deriving either from the injured State's reaction and its coercive effects with regard to cessation or reparation; or, possibly, from the self-inflicted harm it incurs in giving satisfaction and guarantees of non-repetition under the pressure exercised by the said reaction.

4. This Special Rapporteur finds it difficult to express an opinion on the question whether (and possibly to what extent) the above description correctly reflects the state of general international law on this point, or, for that matter, on the question whether that state of the law is a satisfactory one. It is easy to presume, of course, that any State resorting to countermeasures against a law-breaking State does not do so without some measure of punitive intent. In most cases such an intent will be so totally absorbed by the intent to seek cessation/reparation that it will not cross the threshold of distinct legal relevance. The situation may well seem to be different in cases where the main concern of the injured State is to seek satisfaction and/or guarantees of non-repetition. An intent to chastise may become in such cases more pronounced: and although satisfaction will be a self-inflicted penalty, the harm inflicted by the countermeasure aimed at obtaining satisfaction seems to be pretty close to a penalty inflicted by the injured State. 6/ There is also the hypothesis of a countermeasure taken by a State against another in a situation where, no cessation or reparation being sought or possible, the only conceivable function of the reaction is chastisement. In the practice considered we have only been able to find few cases where an

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5/ Annuaire IDI 1934, p. 710.

6/ As clearly explained by Morelli: "L'analogia con la pena del diritto statale è, nella rappresaglia, piu stretta che nella soddisfazione. Infatti, mentre quest'ultima ... si concreta in una condotta dello stesso soggetto responsabile, la quale costituisce il contenuto di un obbligo di tale soggetto, la rappresaglia, come la pena, consiste in un male che al soggetto responsabile viene lecitamente inflitto da un diverso soggetto" [The analogy with penalty in municipal law is, in the case of reprisals, stricter than in the case of satisfaction. Indeed, while the latter ... consists of conduct of the law-breaking State itself, such conduct being the object of an obligation of the said State, reprisal, like penalty, constitutes harm lawfully inflicted on the law-breaking State by another State] (Nozioni di diritto internazionale, Padua, 1967, p. 363).

explicit punitive intent seems to have been revealed. 7/ It should also be noted that more numerous and more significant cases of punitive measures would presumably emerge from the study of the practice concerning those types of internationally wrongful acts that draft article 19 places in the more or less clearly distinct class of international crimes of States. More generally, the cases where a punitive intent might be more visible could be those where the internationally wrongful act is characterized, if not by dolus, by a high

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7/ A "punitive" element seems to characterize, for example, some takings of foreign property. One case was the Cuban taking of American property following the United States cutting-down of Cuban sugar imports (M. Whiteman, Digest of International Law, vol. 8, Washington, 1967, pp. 1041-45; Keesing's, Contemporary Archives, pp. 16902, 17538, 17542, 17591, 17787). Another case was the Libyan expropriation of British assets following the allegedly wrongful toleration by the United Kingdom of the Iranian occupation of three Persian Gulf islands (see A. de Guttry, Le rappresaglie non comportanti la coercizione militare nel diritto internazionale, Milano, 1985, pp. 83-89). A similar function seems to have been attributed by Indonesia to the takings of Dutch property by way of reaction to the alleged violation by the Netherlands of the "Round Table Conference" agreements concerning the future status of West-Irian. The Indonesian Government declared in fact at the United Nations General Assembly that these measures had been adopted because, "being denied the opportunity to negotiate our differences with the Dutch, we are compelled to take other measures short of war" (GAOR, 13th session, 762nd Meeting, plenary 29 September 1958, p. 213). The Indonesian President himself asserted in connection with the same matter: "While the Dutch attitude in the question of West-Irian is still stubborn, I sound warning that, if, in the question of West-Irian, the Dutch remain stubborn, if, in the question of our national claim, they remain headstrong, then all the Dutch capital, including that in mixed enterprises, will bring its story to a close on Indonesian soil" (see it in American Journal of International Law (thereafter cited as AJIL) vol. 54, 1960, p. 486).

A "punitive" aim - namely, the mere condemnation of the wrongful act - seems to characterize at times some of the measures taken by States against serious violations of human rights. Subject to further analysis of cases of this kind in due course (namely in connection with international crimes of States), one may recall, for the time being the measures taken by France against the Central African Republic in May 1979, following the killing of 85 young people by Emperor Bokassa's personal guard (RGDIP, Chronique des faits internationaux, 1980, pp. 361 ff.); the measures taken by the United States against China in June 1989, following the Tien An Men incidents (ibid., 1990, p. 484); and those taken by Belgium against Zaire in May 1990, (following the murder of about 50 students by the personal guard of President Mobutu (ibid., 1990, p. 1051).

degree of fault. 8/ Be that as it may of such hypotheses, we are inclined to believe that even if it were to be found that a punitive intent is more or less frequently present behind the decision of injured States to resort to countermeasures, it would be very difficult to conceive the presence of such an intent as more than a factual characterization of the function of countermeasures. As a matter of law - whether lata or ferenda - it would seem to be inappropriate to cover such a hypothesis by any permissive rule within the framework of a project on State responsibility. Equally inappropriate, in our view, would be a rule intended to lay down an express prohibition of any punitive function of countermeasures. Any excess - qualitative or quantitative - of the injured State's reaction should be adequately condemned by the principle of proportionality and by the other limitations to the injured State's faculté of reprisal.

5. In a different sense the function of countermeasures is of relevance with respect to interim measures of protection. As will be shown in the following Chapter (on the impact of dispute settlement obligations) resort to such measures may be lawful - subject to limitations - before any settlement procedure has been initiated and even in the course of such a procedure. 9/ In envisaging such prohibitions, we accept the position of our distinguished predecessor, Professor Riphagen. 10/ While doing so, however, we wish to dissociate ourselves from the position of those authors who believe that interim measures of protection are characterized by the subjective aim of the State resorting thereto, either to avoid prejudging the possibility of reparation or to induce the other party to submit to a dispute settlement procedure to which it may be committed. 11/ We believe, instead, that the measures in question - and the special regime to be envisaged for them even in the presence of third party settlement procedures - are characterized, more precisely, by the protective function they objectively perform within the framework of the relevant settlement procedure. They will thus presumably consist of reversible measures, mostly of an economic character and such as to ensure to the injured State a value not exceeding the amount of compensation it may claim through the relevant settlement procedure.

8/ On the relevance of fault, in the degree of gravity of an internationally wrongful act, see Second report on State responsibility, doc. A/CN.4/425/Add. 1, paras. 162-188, and "State Fault and International Responsibility: Problems of Attribution and Relevance" in Mélanges Virally, Paris, 1991, pp. 13 ff. For further developments, particularly with regard to the importance of fault with regard to the characterization of international crimes of States, see G. Palmisano, La "colpa dello Stato" ai sensi del diritto internazionale: problemi preliminari allo studio della colpa nella responsabilità internazionale, doctoral thesis, University of Milan, 1992, chapter XII.

9/ Infra paragraphs 41 and 48, and draft article 12, subparagraphs 2 (b) and (c), in chapter III, paragraph 52.

10/ W. Riphagen, Sixth report on State responsibility, YBILC 1985, vol. II, Part One, draft article 10, subparagraphs 2 (a) and (b) and comment thereto.

11/ Third report, cit., paragraphs 56-57.

C. Protest, intimation, sommation and/or demand of cessation and reparation

6. Although the doctrine generally seems to be inclined to accept the notion that countermeasures ought in principle to be preceded, under existing law, by some form of protest, intimation, claim, or sommation, 12/ a high degree of vagueness persists with regard to both the identification of such requirements and the conditions under which they may vary or be dispensable. 13/ As stated earlier, the indications of the literature concerning the impact, either of the nature of the wrongful act or of the nature of the measures envisaged, should be tested by a further analysis of State practice in order to obtain more precise elements. 14/

7. The relevant practice of the nineteenth century concerns mainly those military countermeasures which, while admittedly extreme, were not at that time legally condemned. The very seriousness of such measures (combined with the fact that they were frequently subject to constitutional requirements within the municipal law of the acting State) imposed upon the governments the exercise of some degree of caution. 15/ This explains in part the particular

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12/ Third report, cit., paragraphs 46-49.

13/ Third report, cit., paragraph 50. A recent interesting study has been prepared as a doctoral thesis in Rome University by A. Gianelli (Adempimenti preventivi al ricorso a misure di reazione all'illecito internazionale, Rome University, 1990).

14/ Third report, cit., paragraph 51.

15/ For instance, it may be recalled that in 1807, the British envoy to the United States for the Chesapeake case stated, in general terms, that "if, when a wrong is committed, retaliation is immediately resorted to by the injured party, the door of pacific adjustment is closed and the means of conciliation are precluded" (W.H. Wharton, A Digest of International Law of the United States, Washington, 1887, vol. III, pp. 71-72).

In 1862, Secretary of State Seward declared that the United States would not have used armed reprisals in order to obtain compensation for the damage suffered by United States citizens on the part of foreign States "unless no other mode of prosecution remains" (W.H. Wharton, A Digest, cit., III, p. 100).

In 1883, during a parliamentary debate, the Italian Foreign Minister Pasquale Stanislao Mancini stated that reprisals in general constituted "l'ultima ratio che il diritto delle genti consente agli Stati e ad essi talvolta è costretto a ricorrere anche un Governo civile quando però abbia esaurito tutti i mezzi pacifici ed amichevoli che sono in suo potere" [the ultimate ratio that international law allows States and even a civilized Government is at times obliged (forced) to resort to them, but only after having exhausted all the peaceful and amicable means which are in its power (at its disposal)], (La prassi italiana di diritto internazionale, Prima Serie, Dobbs Ferry, N.Y., 1970, vol. II, p. 905).

care taken by the acting governments in emphasizing that force was resorted to by them only after cessation and/or reparation had been unsuccessfully demanded. 16/ The same practice reveals that a protest or intimation precedes

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16/ It must be noted, however, that the cases in question are examples of the so-called "gunboat diplomacy". The fact that we mention them here means neither that we consider such a practice legally admissible as a countermeasure, nor, in particular, that we take it for granted that the actions of the allegedly injured States were taken following an actual internationally wrongful act. The cases in question are recalled simply in order to stress the fact that even where this reproachable policy was resorted to the allegedly injured States felt that they could not dispense with the requirement of a prior demand of cessation or reparation and with that of a "sommation".

In the Water Witch case (1855-1859) the United States demanded reparation from Paraguay for having opened fire against a United States warship and killing a sailor. Congress, following a request from President Buchanan, authorized him "to adopt such measures and use such force as, in his judgment, may be necessary and advisable, in the event of a refusal of just satisfaction by the Government of Paraguay". The United States envoy in charge of presenting the demand of reparation was escorted by a naval force, and this circumstance persuaded Paraguay to satisfy the United States demands in a very short time, W.H. Wharton, A Digest, cit., vol. II, pp. 113-114; emphasis added.

In 1861, Great Britain demanded reparation from Brazil for the looting, off the Brazilian coast, of a British ship, the Prince of Wales, and for the offences suffered by three British officers. Following Brazil's refusal to satisfy the requests, Great Britain carried out a blockade of the port of Rio and confiscated five Brazilian ships. Brazil, while not accepting the British authorities' version of the facts, made reparation for the damage (J.B. Moore, A Digest of International Law, vol. V, Washington, 1906, pp. 135-136).

In 1865, following an aggression suffered by Italian fishermen off the coast of Tunisia the Italian consul presented a request for reparation to the Tunisian Government. The Tunisian Government refused stating that the fishermen who had suffered the aggression were to be considered responsible. After having insisted upon his request to no avail, the consul arranged for a frigate to be sent in his support. At that point, the Tunisian authorities proceeded to satisfy the Italian requests. (La prassi italiana, cit., Prima Serie, vol. II, p. 894).

In 1902, Venezuelan authorities arrested seven French nationals who had refused to pay customs duties which they had previously paid to a different revolutionary faction. The commander of a French warship intimated that the local government release the French nationals who had been arrested. Following the authorities' refusal, the Commander stopped a Venezuelan

also such temporary forcible measures as the seizure of vessels or customs buildings undertaken by the allegedly injured State by way of an interim or provisional measure against a past or continuing unlawful conduct. 17/

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warship, and, while keeping it under fire, renewed its request. The French nationals were released very shortly afterwards (RGDIP, Chronique des faits internationaux, vol. 9, 1902, pp. 628-629).

In 1914, Mexican soldiers arrested an officer and two United States sailors, while they were anchoring their ship in the port of Tampico. Notwithstanding the immediate withdrawal of the steps taken and the apologies offered to the United States by General Huerte, at that time Head of State, the United States additionally required a salutate to the flag accompanied by a volley of cannonshots. Huerte refused, considering the requests to be excessive. Congress authorized the President of the United States to "employment of the armed forces ... to enforce his demand for unequivocal amends for certain affronts and indignities committed against the United States". As a consequence, United States forces took over Vera Cruz (AJIL, Editorial Comment - Mediation in Mexico, vol. 8, 1914, p. 582). The armed actions by the United States were followed by a long interruption of diplomatic relations between the two countries. The situation improved as a result of the mediation of certain Latin American countries (ibid., pp. 582-585).

17/ In 1840, within the context of the dispute between the United Kingdom and the Kingdom of the two Sicilies over the exploitation of Sicilian sulphur mines, it was only after long and repetitious exchanges between the two Governments and the expiry of a deadline that the United Kingdom proceeded to the seizure of Neapolitan ships at anchor in Malta. The seizure was to be maintained until the British claim would be met (J.B. Moore, A Digest, cit., vol. VII, 1906, p. 132).

In 1901, in response to a number of unlawful acts to the detriment of individuals and companies of French nationality in the Ottoman Empire, the French Government decided to seize the Mytilene customs office only after long reiterated demands to obtain reparation and following a precise intimation that in the event of any further refusals or "fins de non recevoir" France would resort to forcible measures. The seizure was maintained until the Ottoman Government had met the French demands. In its official declaration, the French Government explained that it had decided to "saisir la douane de Mytilène, de l'administrer et d'en retenir les produits nets jusq'au jour où le gouvernement du Sultan nous aura accordé toutes les satisfactions devenues nécessaires". (Moncharville, Le conflit franco-turc de 1901, in RGDIP, vol. 9, 1902, p. 686).

In 1906, following the murder of an Italian soldier guarding an elections office in the Island of Crete, the Italian Government claimed from the local government, inter alia, compensation for the damage suffered. The responsible government refused. The Italian consul arranged for the seizure of some customs posts with a view to securing direct compensation only after the

8. Even as regards non-forcible measures, nineteenth century cases may be recalled in which an injured State resorted to countermeasures only after its repeated demands for reparation from the allegedly wrong-doing State had been unsuccessful. 18/ Reiteration of the demand indicates that a minimum requirement of prior intimation was met.

9. It appears that a protest or intimation was dispensed with in a number of instances of resort to force in order to protect nationals in danger on foreign soil. 19/ Although we are not sure that cases such as these should be classified, as maintained by some, under the rubric of self-defence, 20/ we

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original demand for compensation had been followed by a fruitless intimation (sommation) on his part. The seizures were revoked as soon as the local government had complied with the demand for compensation. (La prassi italiana, cit., Seconda serie, vol. III, pp. 1703-1704).

18/ In 1855, it was only after formal protests and after the Chinese authorities had admitted a breach but refused to make good the injury to the United States for the ill-treatment of an American national, that the US Secretary of State authorized the American Ambassador to withhold any payments due to China up to the amount of the reparation due. (W.H. Wharton, A Digest, cit., vol. II, p. 576).

19/ Various of the cases in question concern the United States. For example, in 1895 the United States feared that its nationals, missionaries in particular, might be the victims of a massacre in certain areas in the Ottoman Empire. For this reason the United States Government authorized warships to enter Ottoman territorial waters. The Ottoman Ambassador in Washington asked for an explanation and was told that it was a "long established usage of this Government to send its vessels, in its own discretion, to the ports of any country which may for the time being suffer perturbation of public order and where its countrymen are known to possess interests. This course is very general with all other governments" (J.B. Moore, A Digest, cit., vol. VI, pp. 342-343).

Other cases concern a similar action threatened by Brazil against Uruguay in 1864 (BRUNS, Fontes Juris Gentium, Series B, Sectio I, Tomus I, Pars 1, Berlin 1932, p. 76) and by Italy against Uruguay in 1875 (La prassi italiana, Prima serie, cit., vol. II, p. 938). A concerted action by Great Britain, France and Spain against Mexico in 1861 was also motivated on the grounds of protection of nationals in danger (J.B. Moore, A Digest, cit., vol. III, p. 98), as well as, and probably with more reason, by different Western Powers intervening in China at the time of the Boxers uprising in 1891 (La prassi italiana, Seconda serie, cit., vol. IV, pp. 1782-1783). On this practice see also A. Gianelli, Adempimenti preventivi, cit., 1990, chap. II, No. 6 (b).

20/ See especially D. Bowett, Self-Defence in International Law, Manchester, 1958, pp. 87 ff., 91 ff.; and, for an overview of doctrine on the point, N. Ronzitti, Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity, Dordrecht, 1985, chap. 1, pp. 3 ff. On the legal qualification of this practice, see the forthcoming addendum to the present document.

believe that they are not without interest for our topic: the fact that a protest or an intimation to cease seems to be lacking, may well be justified by the urgency of a remedy and the persistence of the injurious conduct. In general, however, the presence of some form of intimation is clearly evident in cases of forcible measures. The awareness on the part of the acting States of the legally binding nature of such a requirement is apparently less clear. This uniform pattern, combined with the absence of statements to the contrary, seems to indicate, nevertheless, that if a customary rule did not yet exist, it was, however, in an advanced state of formation. This is confirmed by later practice.

10. The part of the twentieth century preceding the Second World War, was notoriously characterized by attempts to strengthen bilateral and multilateral peaceful settlement obligations. 21/ It is here of interest to note, on the one hand, that the existence of any such obligations absorbs, so to speak, the more elementary requirement represented by some form of protest or sommation; on the other hand, that for the period now under review only the latter requirement (unlike the one referring to peaceful settlement obligations) is mandatory under general international law. The practice of the period clearly indicates the general acceptance of the notion that under customary international law an injured State could not lawfully resort to measures without previously claiming cessation and/or reparation in some form. Indeed, as in the previous period, resort to force was frequently preceded by a demand of reparation and/or cessation. Such was the case even in the otherwise condemnably disproportionate measures taken in the Tellini (Janina) case: a case some aspects of which were submitted by the League of Nations to a Committee of jurists. 22/ The binding nature of the requirement had notably

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21/ See infra paragraphs 25-31.

22/ League of Nations Official Journal, 1923, pp. 1278 ss. On the case see also N. Politis, Les représailles entre Etats membres de la Société des Nations, in RGDIP, vol. 31, 1924, pp. 5-16.

Other cases of armed reprisals were the actions taken by France against Germany in 1920-1921. On 2 April 1920, Germany had sent troops into the Ruhr in order to curb disorders in that neutralized area. Invoking the neutralization provided for by the Versailles Treaty, France demanded to no avail that the troops be withdrawn. The French Prime Minister then announced to the German chargé d'affaires that since the French demand of compliance with the Treaty had been ineffective, he had ordered the French Army to occupy Frankfurt, Hamburg and other German cities. He specified that the occupation "prendra fin aussitôt que les troupes allemandes auront complètement évacué la zone neutre" [will end once the German troops have been completely removed from the neutral zone] (A. Kiss, Répertoire de la pratique française, vol. VI, p. 30). A new French occupation of German cities was carried out in 1921. The French premier stated that the measure had been taken after two years of

been emphasized in the Naulilaa decision, according to which "la représaille n'est licite que lorsqu'elle a été précédée d'une sommation restée infructueuse" [reprisals are lawful only when they have been preceded by a sommation that has been fruitless]. 23/ While rejecting the charge that it had not met the said requirement, the accused State did not contest the rule. With regard to the same case, it is also worth noticing that the Arbitral Tribunal in its decision stressed that the injured State's initial reaction should be such as to reach the Government of the State against which measures were to be taken. 24/ The obligation of the injured State to "(m)ettre au préalable l'Etat auteur de l'acte illicite en demeure de le faire cesser et d'accorder éventuellement les réparations requises" [first demand cessation by the law-breaking State and payment of any reparation required] was also stressed by the International Law Institute in its 1934 Resolution on reprisals. 25/ This period's practice also includes cases of forcible measures of protection of nationals in danger on foreign soil. The fact that

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German non-compliance with the Versailles Treaty obligations and after repeated continued demands of compliance on the part of France, including threats of resort to coercive measures. It should be noted that the motivation given by the French Prime Minister indirectly extends its relevance to less serious situations not requiring the use of force. According to his motivation, the action was an expression of "un droit qui n'a jamais été contesté, qui a toujours été pratiqué dans tous les pays et qui permet à un créancier non payé d'exercer sur son débiteur de mauvaise foi les coercitions nécessaires" [a right that has never been contested, that has always been exercised in all countries and enables an unpaid creditor to use the requisite coercion in regard to a debtor who acts in bad faith] (A. Kiss, Répertoire, cit., vol. I, p. 131).

A further confirmation of this principle is to be found in the United States Naval War College textbooks (1928), where it was stated, with regard to reprisals in time of peace that "(f)orce is not justified legally unless there has been a refusal to make redress after due notice" (G.H. Hackworth, Digest of International Law, Washington, vol. VI, 1940-4, p. 152; emphasis added).

23/ UNRIAN, II, P. 1027.

24/ UNRIAN, II, pp. 1027-1028.

25/ Annuaire de l'Institut de Droit International, vol. 38, 1934, art. 6, p. 710.

an intimation to cease the injurious conduct is not always present, 26/ seems to be justified by the urgency of reaction to offences of a serious and continuing character.

11. Once the state of the law prior to the Second World War has been established with regard to the requirement in question - and once established that a prior demand or "sommation" was due at that time as a matter of legal obligation, it is relatively easy to see how the question may stand in law at present. The combined effect of such principles as those embodied in paragraphs 3 and 4 of Article 2 of the Charter of the United Nations - and the effect of any analogous principles or rules of general international law - not to mention the reiterations and specifications of the same principles in United Nations resolutions - could not but consolidate the binding force of the requirement of a prior demand of reparation (and sommation) as a condition of lawful resort to measures against internationally wrongful acts. This seems to be clearly confirmed by the prevailing practice.

12. It is significant, to take a first set of examples, that even in the cold war period, despite the large number of disputes between States belonging to the rival blocs with regard to violations of a State's air space, resort to reprisals has almost constantly been avoided. This was precisely because the initial representations - in the form of demands of reparation or satisfaction were followed by a phase of research of a negotiated or arbitral solution the pursuit and attainment of which allowed States to avoid resort to unilateral measures. 27/ It is equally significant that in the period now under review

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26/ For example, in March 1927, during the internal struggle in China an American national was killed in Nanking, another wounded and the United States consulate assaulted. United States troops who were on board ships anchored in the port immediately intervened and opened fire on the soldiers and on the crowd which, at the same time, was continuing an attack on a group of Americans. The American citizens were brought to safety on board the ships. The United States Government later demanded complete reparation and full satisfaction. It should be noted that the Chinese authorities, while accepting the United States Government's demand, requested the Government to apologize for having opened fire. The United States final response was that "its naval vessels had no alternative to the action taken, however deeply it deplores that circumstances beyond its control should have necessitated the adoption of such measures for the protection of its citizens at Nanking" (Dennis, Editorial comment, vol. 22, AJIL 1928, pp. 593-599). Similar cases are described in A. Gianelli, Adempimenti preventivi, cit., chap. III, No. 7.

27/ On the episodes in question, see A. Gianelli, Adempimenti preventivi, cit., chap. IV, Sect. II, paras. 9-11 (c).

not only acts of reprisal 28/ but also acts of retorsion by way of reaction to an internationally wrongful act have often been preceded by a demand of reparation. 29/

13. Further indications of the belief that a prior "sommation" is required for resort to measures to be admissible can be found in the official positions taken by States in connection with a number of well-known disputes or situations. For example, in the case concerning the Appeal relating to the Jurisdiction of the ICAO Council, 30/ while Pakistan complained that the measures taken by India had been put into effect "simultaneously with the demand for compensation", 31/ India insisted that since "no positive and satisfactory response was made by the Respondent", it had felt obliged to adopt the contested measure. 32/ In the well-known Air Services case, France, in an attempt to demonstrate the unlawfulness of United States measures,

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28/ For example, in view of the rough treatment inflicted by South Africa upon Indian residents, following protests and contacts, India declared itself authorized to adopt countermeasures and sent South Africa a forward notice of the termination of a commercial agreement of 1945 (Keesing's, Contemporary Archives, pp. 9859-9860).

29/ In 1963, following the nationalization of oil plants belonging to United States companies in Ceylon, the Department of State declared that it would suspend the aid to Ceylon which had already been planned unless "adequate compensation" was paid. The United States did actually suspend such aid for two years (Keesing's, cit., pp. 19667, 20868).

In 1967, during anti-Chinese demonstrations in Burma the office of the Chinese press agency, as well as houses and shops belonging to Chinese nationals were attacked. The national emblem was also destroyed. The Chinese Government protested, demanding various forms of satisfaction. As the Chinese Government was not satisfied with the Burmese authorities attitude following the events, it suspended its aid programme to that country (Keesing's, cit., p. 22277).

In 1981, the European Community, after repeatedly warning the Turkish Government of the negative consequences the deterioration of democratic institutions and the suspension of some fundamental freedoms in that country would have on its relations with the Community, suspended the granting of a loan package (Keesing's, cit., p. 31287).

30/ The case before the ICJ involved the hijacking and destruction of an Indian aircraft in Lahore in February 1972. India accused Pakistan of favouring the hijackers and of not doing all that was necessary in order to save the aircraft. For this reason, after the destruction of the plane, it decided to prohibit Pakistani aircraft from flying over India (Keesing's, cit., pp. 24561-24562).

31/ ICJ Pleadings, 1973, p. 73.

32/ ICJ Pleadings, 1973, p. 7.

cited the Naulilaa decision in support of the international rule that a non-satisfied demand of reparation was an indispensable prerequisite of lawful resort to reprisals. 33/ The United States, for its part, while maintaining that the Naulilaa principles only applied to armed reprisals, contended that it had nevertheless complied with the requirements deemed to be indispensable by France before implementing the measures in question. 34/ Within the context of the Tehran Hostages case, the United States took the trouble to specify, before the International Court of Justice, that the American chargé d'affaires in Tehran had protested with the Iranian Government immediately after the taking of the hostages and had demanded full protection for the embassy and its staff. Also, according to the United States, representations had been made for days before the political and economic measures of reprisal and retorsion referred to in other parts of the present document 35/ were undertaken. Furthermore, the conclusions recently reached on the present matter by the American Law Institute in its Restatement of the Law Third cannot be neglected. According to the comment to paragraph 905, devoted to "unilateral remedies": "[c]ountermeasures in response to a violation of an international obligation are ordinarily justified only when the accused State wholly denies the violation or its responsibilities for the violation; rejects or ignores requests to terminate the violation or pay compensation; or rejects or ignores proposals for negotiations or third-party resolution". 36/

14. One must also admit that, notwithstanding the prohibition of the use of force contained in the United Nations Charter, armed reactions to internationally wrongful acts having a continuing character and implying a serious personal danger for the nationals of a State on foreign soil, have in a few cases continued to take place. These cases, however, differ

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33/ ILR, Vol. 54, 1979, p. 319.

34/ The United States notably maintained that it had unsuccessfully demanded that France discontinue its Air Traffic Treaty violation and that an ad hoc agreement for arbitration be concluded (Digest of U.S. Practice in International Law, 1978, p. 773).

35/ Two days after the taking of the hostages, a special envoy of the United States Government arrived in Tehran in order to negotiate their release. Despite the prohibition by the Iranian Head of State of any contact with the United States envoy, the latter was able to engage in telephone communications with high Iranian officials and expressed the firm protest of his Government for the events. Attempts to make contact with the Iranian Government continued for another four days (ICJ Pleadings 1982 pp. 260-261).

36/ The American Law Institute, Restatement of the Law - The Foreign Relations Law of the United States, vol. 2, St. Paul, Minn., 1987, p. 381.

significantly from similar cases in the previous period in so far as the injured State usually resorts to forcible action only after addressing to the law-breaking State an unfruitful intimation of cessation or reparation. 37/

15. The cases considered in the preceding paragraph - as well as some of those considered earlier in paragraph 7 - obviously involve problems related to the lawfulness of resort to armed force. From the point of view of the subject-matter of the present chapter they do demonstrate, nevertheless, that it is the belief of States that, even in cases characterized by a high degree of wrongfulness and continuity - and calling for very urgent remedy - resort to measures on the part of the injured State must be preceded, under the law of responsibility, by appropriate demands, sommations or intimations.

16. On the other hand, contemporary practice also includes measures resort to which does not always appear to be subject to any prior communication or intimation. Such seems to be the case of the freezing of assets belonging to the law-breaking State and situated within the reach of the injured State. Freezing measures are in general characterized: by their temporary nature (although some freezes have lasted decades); and by a merely economic object (usually bank deposits). 38/ Such are the features of those reactions which

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37/ This is what happened in the Mayaguez dispute of 1975, in which the United States (without success) resorted to military action in order to rescue the crew of a ship detained by the troops of Sihanouk's Cambogian regime. The United States action was indeed preceded by a 24 hours ultimatum transmitted to Cambodia through the Chinese Embassy in Washington and was carried out only after the expiry of the ultimatum (Keesing's cit., pp. 27239-27240). The United States also resorted to military action in its attempt to rescue the Tehran Hostages. In this case while the United States Government had tried and was still trying to settle the matter through peaceful means, it also announced, through a Presidential statement, that in view of the unsuccessfulness of the attempts at peaceful settlement and of the ineffectiveness of the economic measures, forcible action appeared to represent the only possible remedy. On this case see N. Ronzitti, Rescuing Nationals Abroad, cit., pp. 41-49. United States interventions in Grenada (1983) and Panama (1989) were too partially justified by that Government as actions for the protection of United States citizens abroad. On the Grenada case see Davidson, Grenada, Aldershot, 1987. On the Panama action see official statements of President Bush and the State Department in AJIL, vol. 84, 1990, pp. 545-549.

38/ Among the examples of resort to such measures are the freezing of bank deposits and other assets of Bulgaria, Hungary, Poland and Romania by the United States shortly after the Second World War. The freezing of Romanian assets was revoked in 1959, that of Polish assets in 1960 and that of Hungarian assets in 1973 following the conclusion of the respective lump-sum agreements (Keesing's, cit., pp. 10623, 17349, 17559, 25827; and M. Whiteman, Digest of International Law, Washington, vol. 8, 1967, pp. 1126-1128). Other examples are those relating to the Albanian gold seized by the United Kingdom (KEESING's cit., pp. 10426, 11294, 13634) and to the freezing of Iranian bank

are generally referred to in the literature as interim or provisional measures and with regard to which a number of authors believe no intimations to be required. It is apparently for this reason that our predecessor excluded an obligation of either intimation or prior resort to settlement procedures with regard to this kind of measures. 39/ It should be noted, however, that the measures taken by Cuba against the assets of United States nationals in response to the United States reduction of sugar imports 40/ and by Libya against British assets in response to the United Kingdom's withdrawal from Persian Gulf Islands are not really significant. 41/ The absence of any prior intimation may be explained, inter alia, by the fact that the measures in question were resorted to within the context of an actual, open dispute in the course of which the States involved had already exchanged charges and arguments. The circumstances rendered any intimation superfluous.

17. The draft articles proposed in 1986 by our predecessor deal with the matter within the framework of Part Three. Article 10 of Part Two only deals with dispute settlement procedures to be restricted to prior to the measures contemplated in draft article 9 (other than the so-called "reciprocity" measures which are covered by draft article 8) to the exception of certain kinds of "interim measures of protection". 42/ The problem of conditions,

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deposits and other assets by the United States following the taking of the Tehran Hostages (ICJ Reports, 1980, pp. 16 ff., 43 ff.). Although this case refers to unlawful conduct generally qualified as crime, we should also recall the freezing of Iraqi assets by the United States, the United Kingdom and France immediately after the announcement of the invasion of Kuwait (1990). These measures were adopted at the same time as the Security Council resolution condemning the invasion but before the resolution adopting measures envisaged in Article 41 of the Charter against Iraq (New York Times, 3 August 1990, pp. A1, A9, A10; 4 August, p. 6; 7 August, p. A9). A case of freezing in which, instead, measures were carried out only after repeated protests is the one referring to the freezing of French assets by Ghana in 1960 by way of reaction against nuclear tests carried out by France in the Algerian Sahara (Keesing's, p. 17280).

39/ Statement by Riphagen, 1867th meeting, in YBILC, 1984, vol. I, para. 34.

40/ M. Whiteman, Digest, cit., 8, pp. 1041-1045; Keesing's, cit., pp. 17538-21-17542.

41/ A. de Guttry, Le rappresaglie, cit., pp. 83-89.

42/ This exception covered the measures "taken by the injured State within its jurisdiction, until a competent international court or tribunal ... has decided on the admissibility of such interim measure of protection" and the "measures taken by the injured State if the State alleged to have committed the internationally wrongful act fails to comply with an interim measure of protection ordered by such international court or tribunal".

here under discussion, was dealt with by Professor Riphagen in articles 1 and 2 of Part Three. Draft article 1 provided that "A State which wishes to invoke article 6 of Part Two of the present articles must notify the State alleged to have committed the internationally wrongful act of its claim. The notification shall indicate the measures required to be taken and the reasons therefor". Draft article 6 provided for pecuniary compensation and guarantees of non-repetition. With regard to countermeasures, draft article 2 (of Part Three) provided for another notification: "If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification prescribed in article 1, the claimant State wishes to invoke article 8 or article 9 of Part Two of the present articles, it must notify the State alleged to have committed the internationally wrongful act of its intention to suspend the performance of its obligations towards that State. The notification shall indicate the measures intended to be taken". 43/ The following draft articles of Part Three provided that if objections were raised by the allegedly law-breaking State the parties (without prejudice to their rights and obligations under any provisions in force between them with regard to the settlement of disputes) "shall seek a solution through the means indicated in Article 33 of the Charter", or the further means provided for under draft articles 4 and 5 of Part Three and the Annex thereto. Professor Riphagen explained that the exchanges between the parties carried out according to the said "notification/objection" mechanism would serve the purpose of defining the point at issue and allowing alleged law-breakers to consider the situation and possibly accede to the allegedly injured State's demands. 44/ As our predecessor explained, however, there could be particular cases in which the protection of an injured State's interests required such urgent remedy as to justify immediate resort - without any prior notification - to the kind of (interim) measures contemplated in his draft article 10, subparagraph 2 (a) of Part Two. 45/

18. In the ILC debate on these proposals, draft Article 10 of Part Two was deemed to be too demanding upon the injured State and thus too lenient towards the law-breaking State. 46/ With regard to draft articles 1 and 2 of Part Three, some members expressed the view that the system envisaged would

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43/ See Seventh report on State responsibility, YBILC, 1986, vol. II, (Part One), p. 2. Professor Riphagen had previously stated that a prior notification was not required by the Vienna Convention on the Law of Treaties for the suspension or termination of conventional rules (Fourth report on State responsibility, in YBILC, 1983, vol. II, Part One, para. 101).

44/ Sixth report, cit., paras. 14-15; Seventh report on State responsibility, doc. A/CN.4/397, article 1 of Part Three of the draft.

45/ Seventh report, cit., comment to article 2 of Part Three.

46/ Statements by Flitan, 1893rd meeting, YBILC, 1985, vol. II; Tomuschat, 1986th meeting, ibid; and Mahiou, 1987th meeting, ibid.

not rule out the possibility of prior exchanges other than the proposed notifications. Other members thought that a system based on a double notification was too burdensome. Some demanded a higher degree of precision with regard to the hypothesis of particular urgency. 47/

19. The present Rapporteur has since the outset expressed the opinion that the so-called "implementation" or "mise en oeuvre" in a narrow sense should not be combined with the provisions of Part Three concerning the settlement of disputes arising over the interpretation and application of the articles on State responsibility. 48/ Any duties to be fulfilled by the injured State as a condition of lawful resort to countermeasures are a part of the consequences of an internationally wrongful act and must be covered as such within the framework of Part Two of the draft. Such is notably the case of any protest or any claim of cessation or reparation and any intimation, sommation or notification. One could argue that an ad hoc provision could be dispensed with, the duty to demand cessation or reparation being absorbed into the duty of prior compliance with dispute settlement obligations. However, a specific rule appears to be preferable for more than one reason. In the first place a dispute might not even arise if the law-breaking State acknowledged wrongdoing and met totally or in part the injured State's demands (a possibility not to be ruled out). 49/ Also, it would be improper not to give an allegedly law-breaking State a chance to answer the allegation before a possibly "public" settlement procedure were resorted to and the situation may have further deteriorated. A prior direct exchange between the parties might reduce the possibility of an early escalation of the dispute. Besides, stringent third party settlement procedure obligations might not be in existence between the parties.

20. The precise content and form of the provision is less easy to define. First of all, one must decide whether or not to specify the channel of the required communication (diplomatic channels, mailed document or other means). Although the realities of international relations indicate that States often communicate less formally, legal certainty might require a written form. But the draft should not, in our view, take a stand in that regard.

21. In so far as the substance of any communications is concerned, Professor Riphagen envisaged, as already mentioned, two notifications: - one for "the measures required to be taken (cessation, restitution in kind, etc.) and the reasons therefor"; - and the other for the intention of the injured State "to suspend the performance of its obligations" with the indication of the "measures intended to be taken". A less cumbersome solution might be to

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47/ YBILC, 1986, vol. II, Part Two, paragraphs 51-54.

48/ Preliminary report on State responsibility, doc. A/CN.4/416, paragraph 19. See also our comment to the Third Part of the draft as envisaged by Riphagen, in YBILC 1985, vol. I, 1900th meeting, paragraphs 26-27.

49/ For this hypothesis, see A. Gianelli, Adempimenti preventivi, cit., Introduction, paragraph 3.

impose upon the allegedly injured State the duty to submit its protest or demands to the alleged law-breaking State together with the indication of the essential facts and any suitable warning of possible countermeasures. The injured State would remain of course at liberty to make any additional communications or specifications it may deem useful in the light of the nature of the wrongful act, of the condition of its relations with the alleged wrongdoer and any other circumstances it may deem relevant. We believe that the injured State should also remain free to choose whether or not to specify the measures envisaged.

22. Another problem is whether any specific time limits should be indicated by the injured State. We believe that the articles should not go beyond the indication of the possibility that any such limit be set, the limit depending on the nature and the circumstances of the case. It might be indicated that any time limit should be reasonable.

23. As regards the problem of possible exceptions to the requirement of a prior demand of cessation or reparation and of a timely notification/ intimation, the question could arise with respect to interim measures of protection. 50/ However, while we believe that measures of such a nature could actually be the object of an exception in so far as the impact of dispute settlement obligations upon the admissibility of countermeasures is concerned, 51/ we feel that they should not be exempted from the minimum prerequisite in question. The obvious reason is that the State which has committed the internationally wrongful act should be given the possibility of complying spontaneously with its obligations of cessation and/or reparation (lato sensu) before the "countermeasures stage" were reached.

50/ On the notion of interim measures of protection, see supra para. 5.

51/ See infra para. 48.

CHAPTER II - THE IMPACT OF DISPUTE SETTLEMENT OBLIGATIONS

A. State practice prior to the First World War

24. The impact of the availability of dispute settlement procedures upon the lawfulness of resort to countermeasures does not emerge with any significant degree of clarity from the international practice preceding the First World War. Of course, there are cases, even in that period, in which the injured State adverted at least the political expediency, if not a legal obligation, not to resort to countermeasures prior to an unsuccessful attempt at a mutually agreed or, more rarely, at an arbitral solution. 52/ In no instance, however, did a State contest the lawfulness of a reprisal of which it was the target on account of the fact that the counterpart had omitted to previously attempt a dispute settlement procedure. Among the reasons of this state of affairs there may have been, on the one hand, the persistent total freedom of States to resort to forcible action including war, in the pursuit of their rights or interests; on the other hand, the scarce availability (as compared to the subsequent period) of relatively effective third party dispute settlement procedures. Significant elements relating to the impact of dispute settlement procedures upon the liberty of States to resort to unilateral measures do not seem to emerge in all events from the dispute settlement instruments of the first two decades of the present century. 53/

B. State practice during the inter-war period

25. The treaty practice subsequent to the first World War reveals some progress. In 1925, for example, in addition to negative obligations regarding resort to force, 54/ the Locarno treaties also introduced positive peaceful

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52/ In the Pacifico case between Great Britain and Greece (1847-1851), concerning acts of violence in Greek territory against a British subject, the United Kingdom pursued unfruitful diplomatic exchanges with Greece for more than two years. Asserting at the end that it had tried all the amicable means at its disposal in order to obtain reparation, the British Government presented Greece with a 24-hour ultimatum and then sent a naval force to blockade ports and seize Greek vessels (W.H. Wharton, A Digest, cit., vol. VIII, pp. 100-101). It is worth recalling that, as a result of French good offices, the British naval commander suspended the blockade and maintained only the seizures. However, following the lack of success of the French interposition, the blockade was resumed (C. Calvo, Le droit international théorique et pratique (1868), 3rd ed., Paris 1880-1881, vol. III, p. 524). On this point see also supra paragraph 7.

53/ We refer to the numerous general arbitration treaties concluded prior to 1917, to the Hague Conventions of 1899 and 1907, to the Drago-Porter Convention and to the so-called Bryan conciliation treaties.

54/ See, for example, article 2 of the treaty of mutual guarantee between Germany, France and Belgium. (LNTS, vol. 54, p. 289).

settlement obligations for legal disputes in order to prevent resort to unilateral action by the injured State prior to the experiment of the envisaged procedure. 55/ Some provisions also envisaged the possibility for the competent "third party" to indicate interim measures of protection. The parties in dispute were actually bound to accept such an indication and to "abstain from all measures likely to have repercussions prejudicial to the execution of the decision or arrangements proposed by ... the Council of the League of Nations, and, in general, to abstain from any sort of action whatsoever which may aggravate or extend the dispute". 56/ In addition to the well-known renunciation of war as a means of resolving international disputes, the Briand-Kellogg Pact of 1928 provided that "[t]he settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them [the high contracting parties], shall never be sought except by pacific means". 57/ Surely, the Pact's principal object was to condemn direct resort to unilateral use of armed force on the part of the injured State. But it would perhaps not be difficult to assume that it also condemned direct resort to means other than the use of armed force in the presence of other means of settlement. The more so if one considers that, at that time, "pacific means" also included those forcible measures which - because they did not lead to a state of war - were qualified as coercive measures "short of war". 58/ Some of the provisions of the so-called "Saavedra Lamas" treaty, signed in 1933 by a number of Latin American States are also significant. In addition to condemning aggressive war, article 1 of that instrument stated "that the settlement of disputes or controversies of any kind that may arise among them [the contracting States] shall be effected

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55/ The parties generally undertook to submit to arbitration or to the Permanent Court of International Justice legal disputes not resolved by diplomacy. If the parties did not manage to conclude a special agreement (compromis) each party could seize the Permanent Court unilaterally. The "losing" State was obliged to refrain from reacting unilaterally even in the case where the decision had not been complied with. It would have to address itself to the League of Nations Council for the latter to decide the measures to be adopted with binding effect.

56/ Article 19 of the Belgium-Germany treaty (LNTS, vol. 54, p. 313). A very similar provision was introduced, only for legal disputes, in article 33 of the 1928 General Act for the Peaceful Settlement of International Disputes (LNTS, vol. 93, pp. 345-363).

57/ LNTS, vol. 94, pp. 59-64.

58/ On the controversial meaning of "pacific means", as used at the time, see inter alios, L. Forlati, La sanzione nel diritto internazionale, Padova 1974, pp. 116-117; I. Brownlie, International Law and the Use of Force by States, Oxford 1963, pp. 84-88; J. Zourek, L'interdiction de l'emploi de la force en droit international, Leiden 1974, p. 41.

only by pacific means which have the sanction of international law". 59/ Furthermore, the treaty envisaged a conciliation procedure for any kind of dispute and article 13 prohibited for the duration of the conciliation process "any measure prejudicial to the execution of the agreement that may be proposed by the commission and, in general, ... any act capable of aggravating or prolonging the controversy". 60/

26. The stipulations considered in the immediately preceding paragraph seem to indicate that a tendency of States to condemn unilateral reaction to an internationally wrongful act - whether armed or not - when the case was actually subject to a conciliation or arbitral procedure did exist, in the inter-war period. At the same time, the fact that this was the only restriction of the right of reprisal forming the object of explicit conventional provisions appears to suggest that the restriction in question was not implied by the mere existence of dispute settlement obligations. Such was particularly the case, we submit, for non-armed measures.

27. A look at other elements of State practice in the same period confirms on the whole, although not without inconsistencies, the data which we have just drawn from conventional instruments. A case in point is the well-known Janina (Tellini) case between Italy and Greece (1923). It was - and still is - generally agreed that, despite the gravity of the incident, the demands of the Italian Government were unreasonable and the forcible measures excessive. As pointed out by Greece before the League of Nations in Geneva:

> "[i]f the engagements entered into under the Covenant are to be respected ... steps should be taken to stop the measures of coercion which have begun ... [B]etween Members of the League of Nations there was no longer any place for measures such as an ultimatum and coercion. According to article 12, the Members of the League of Nations have entered into a solemn undertaking to follow a judicial procedure or a political procedure before the Council at their own discretion. There is nothing outside these alternative procedures". 61/

59/ UN Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928-1948, p. 1039.

60/ Hackworth, Digest, cit., vol. VI, pp. 9-10. The latter prohibition, already present in the Locarno treaties and in the 1924 General Act, appears in a number of bilateral arbitration treaties concluded in the period 1924-1931. These instruments frequently introduced the so-called "optional clause" of compulsory jurisdiction, under which the Hague Court could be seized unilaterally. References in A. Gianelli, Adempimenti preventivi, cit., chap. III, Sec. 1, paragraph 3.

61/ League of Nations Official Journal, 1923, p. 1281. The Italian side maintained that the measures taken had been "pacific", admissible as such by both general international law and the Covenant, only war being condemned by the latter (ibid., pp. 1313-1314).

28. While conforming with the Italian wish that the conflict be left in the hands of the Allied Ambassadors' Conference, the League Council submitted to a committee of jurists the well-known issue about the admissibility, under the Covenant, of measures short of war. 62/ And the answer was that "[c]oercive measures which are not intended to constitute acts of war may or may not be consistent with the provisions of Articles 12 to 15 of the Covenant, and it is for the Council, when the dispute has been submitted to it, to decide immediately, having due regard to all the circumstances of the case and to the nature of the measures adopted, whether it should recommend the maintenance or the withdrawal of such measures". 63/ Despite this bland opinion, however, the majority of commentators contested the admissibility of any armed reprisals in the context of the peaceful settlement obligations set forth in the League of Nations Covenant. 64/ The whole episode nevertheless shows that even within a context such as that of the Covenant - a relatively advanced legal instrument in comparison with general law - the governments of that time were, to say the least, reluctant to unambiguously admit the existence of obligations under which resort to unilateral measures short of war - whether armed or not - would be subject to prior resort to, and exhaustion of, amicable settlement procedures.

29. The opinion expressed in 1928 by the Swiss Département politique was decidedly progressive and very clear. According to Swiss diplomacy (with reference to the League of Nations Covenant): "les représailles ne peuvent être envisagées que si la procédure d'arbitrage prévue par l'article 13 a été proposée en vain. Toutefois, le refus de la procédure d'arbitrage ... n'autorise pas encore l'exercice de représailles; car l'article 15 prévoit l'appel au Conseil de la Société des Nations" [reprisals may be envisaged only if the arbitration procedure provided for in Article 13 has been proposed in vain. However, rejection of the arbitration procedure ... still does not

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62/ "Are measures of coercion which are not meant to constitute acts of war consistent with the terms of articles 12 to 15 of the Covenant when they are taken by one Member of the League of Nations against another Member of the League without prior recourse to the procedure laid down in those articles?"

63/ League of Nations Official Journal, 1924, p. 524.

64/ See, inter alios, N. Politis, Les représailles entre Etats membres de la Société des Nations, in RGDIP, vol. 31, 1924, pp. 5-16; D.J. Hill, The Janina-Corfu Affair(-EXECUTE-)1 Comment in AJIL, vol. 18, 1924, pp. 98-104; C. De Visscher, L'interprétation du Pacte au lendemain du differend italo-grec, in Rev. du D.I. et de Législation Comparée, vol. 5, 1924, pp. 213-230; O. Hoijer, Le Pacte de la Société des Nations, Paris, 1926, p. 218. Contra K. Strupp, L'incident de Janina entre la Grèce et l'Italie, in RGDIP, vol. 31, 1924, pp. 255-284.

authorize the use of reprisals, for Article 15 provides for an appeal to the Council of the League of Nations]. 65/ The same Département, with reference to arbitration commitments in general, further stated:

> "[il] faut admettre ici également que la condition prévue par le droit des gens [for resort to reprisals to be lawful] n'est pas remplie si l'on n'a pas essayé vainement de résoudre le différend selon la procédure prévue. La conclusion de traités stipulant l'arbitrage obligatoire pour les différends juridiques exclura les représailles" [it should also be acknowledged here that the requirement under the law of nations [for resort to reprisals to be lawful] is not fulfilled unless an attempt has been made, to no avail, to settle the dispute in accordance with the procedure established. Concluding treaties by stipulating compulsory arbitration for a legal dispute will rule out reprisals]. 66/

30. Important, albeit less organic, statements were to be made two years later in reply to the questions put to States in view of the Codification Conference. Belgium, for example, replied that a State could lawfully resort to reprisals if it could show that it would not have been possible "to obtain satisfaction by pacific means". 67/ Denmark affirmed that "reprisals would be entirely excluded" if the parties were bound by treaty not to exacerbate their disputes. 68/ More cautiously the United Kingdom expressed the view that "[w]ith the improved machinery now provided by international agreements for the investigation and pacific solution of disputes, the cases where resort to acts of reprisals would be legitimate must be very few". 69/

31. In brief, the inter-war period seems to offer two sets of indications. On the one hand, the rather vague language of treaty provisions dealing expressly with the impact of dispute settlement obligations upon the liberty of States to resort to unilateral measures 70/ seems to confirm the reluctance of States to admit the existence of legal restrictions to their liberty to resort to measures other than war despite the availability of more amicable means of settlement. On the other hand, a growing current of opinion appeared

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65/ Répertoire suisse de droit international public (1914-1939), vol. III, p. 1787.

66/ Ibid., p. 1788.

67/ Conference for the Codification of International Law, The Hague, 1930, p. 128.

68/ Ibid., pp. 128-129.

69/ Ibid., p. 129.

70/ As indicated, these provisions were intended to condemn resort to unilateral measures when the dispute was sub judice and the competent body was endowed with the power to order "provisional measures of protection".

to be present, during that same period not only in the literature but also in the context of diplomatic exchanges, to the effect that whenever conventional settlement procedures were available an injured State could not lawfully resort to reprisals - whether amicable or forcible - without first trying and exhausting the available procedures.

C. Principles and rules emerging after the Second World War

32. Following the entry into force of the Charter a certain, albeit limited, degree of clarification seems to have been achieved:

(i) in the first place, as noted earlier the combined effect of the sweeping language and spirit of Article 2, paragraph 4, and the pronouncements which will be referred to in this section 71/ has at least in principle dispelled any doubt - despite the above mentioned contradictions emerging from the practice of a number of States and with the exception, of course, of self-defence measures 72/ - with regard to the unlawfulness of armed reprisals; 73/

(ii) secondly, it appears that the above prohibition does not exhaust, based as it is exclusively on the letter and spirit of Article 2, paragraph 4, the efforts of the Founding Fathers of the Charter (and their successors) to reduce the area of discretionary choices of States with regard to unilateral remedies. If a meaning is to be given to the distinct provision of Article 2, paragraph 3 - namely, a meaning other than that of a mere redundancy of Article 2, paragraph 4 - one should perhaps admit that the Charter's condemnation is not really confined to the prohibition of armed measures (for which Art. 2, para. 4 is sufficient). It would seem to extend, by virtue of the letter and spirit of Article 2, paragraph 3 and the whole of Chapter VI (Arts. 33 to 38), to any unilateral measures which may endanger - if not "friendly relations" and "co-operation" - international peace and security and justice.

71/ Supra, paragraph 33.

72/ See document A/CN.4/444/Add.1.

73/ It is worth recalling that in addition to Article 2, paragraphs 3 and 4, one must take due account of Article 1, paragraph 1, according to which it is one of the purposes of the United Nations "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace".

It follows that even the measures not involving resort to armed force are, if not condemned, subject to some kind of "legal control"; 74/

(iii) thirdly, it is presumably not just by chance that in opening the Chapter on settlement of disputes, Article 33, paragraph 1 firmly states that parties to a dispute "shall, first of all, seek a solution ..." by one or more of the various means listed thereafter. It seems reasonable at least to infer from that phrase and its context that some negotiation is the object of a duty; and also that, failing a negotiated solution, an attempt to use any other among the means listed in Article 33, paragraph 1 should in principle precede any resort to unilateral measures for the latter to be lawful. The quoted Swiss statement of 1928 that even "le refus de la procédure d'arbitrage ... n'autorise pas encore l'exercice de représailles" ... "car l'article 15 prévoit l'appel au Conseil de la Société des Nations" [rejection of the arbitration procedure ... still does not authorize the use of reprisals ... for Article 15 provides for an appeal to the Council of the League of Nations] is at least as valid for the procedures before the United Nations Security Council and the General Assembly.

33. The main General Assembly resolutions concerning peaceful settlement lend some support to a Charter interpretation of the kind indicated in point (iii) of the preceding paragraph. We refer to the formulation of the principle of peaceful settlement 75/ in the Friendly Relations Declaration. Despite what

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74/ On this point see A. Gianelli, Adempimenti preventivi, cit., chap. IV, sect. 1, para. 6, and the literature cited therein, and especially: H. Kelsen, The Law of the United Nations, London, 1950, pp. 359 ff.; Goodrich-Hambro-Simmons, Charter of the United Nations, New York, 1969, pp. 41-43; Cot-Pellet, La Charte des Nations Unies, Paris, 1991, pp. 103-113.

By placing upon States the positive obligation it enounces, Article 2, paragraph 3 could hardly be considered to condone the adoption by States of lines of conduct which, in addition to endangering "justice", might jeopardize friendly relations (Art. 1, para. 2) or create threats to the peace (Art. 1, para. 1).

75/ General Assembly resolution 2625 (XXV) of 24 October 1970. A similar formulation is included in Principle V of the Helsinki decalogue: "Participating States, parties to a dispute among them, as well as other participating States, will refrain from any action which might aggravate the situation to such a degree as to endanger the maintenance of international peace and security and thereby make a peaceful settlement of the dispute more difficult" (International Organization and Integration, II. D.1. a.i., p. 4, The Hague, Boston, London, 1983).

we believe to be its grave inadequacy in a number of respects 76/ - including the matter here under discussion - that formulation felicitously adds, to the important injunction contained in Article 33, paragraph 1 ("shall first of all"), the further duty of the parties to refrain "from any action which may aggravate the situation so as to endanger the maintenance of international peace and security". The same duty - to refrain from measures which may render "more difficult or impede the peaceful settlement of the dispute" - albeit in a different language, is referred to as being in existence in article 1, paragraph 8 of the more recent (and more articulate) Manila Declaration. 77/ Although both these resolutions could have usefully set forth more specific conditions to be complied with by an injured State before resorting to unilateral measures, they both lend support to an interpretation of the Charter provisions on peaceful settlement under which resort to unilateral remedial measures would, at least in principle, be subject to the compliance with stricter onera of the injured party with regard to the prior use, or bona fide attempt to make use, of available settlement procedures.

34. Although the Charter has not explicitly dealt with the impact of its general dispute settlement provisions on the conditions of resort to unilateral measures, 78/ it can nevertheless be argued that the regime of peaceful settlement in the law of the United Nations does mark an indirect progressive development in the matter.

(i) Firstly, the condemnation of unilateral measures extends, thanks to the letter and spirit of Article 2, paragraph 3, to any reactions susceptible of endangering "peace and security, and justice", even in the absence of any conventional settlement obligations going beyond Article 2, paragraph 3 and Article 33, paragraph 1. Surely, this does not mean that an injured State has no means at its disposal to protect its infringed rights. It simply means that whenever the procedures listed in Article 33, paragraph 1 and unilateral measures taken (compatibly with Article 2, paragraph 3) in order to induce the other party to accept resort to such

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76/ See, for example, the Italian representative's statement (UN doc. A/6230 of 27 June 1966, para. 82, pp. 56-63) in the 1970 Report of the Friendly Relations Committee.

77/ General Assembly resolution 37/10 of 5 November 1982. This text, which is almost identical with the Helsinki formulation, reads: "States parties to an international dispute, as well as other States, shall refrain from any action whatsoever which may aggravate the situation so as to endanger the maintenance of international peace and security and make more difficult or impede the peaceful settlement of the dispute, and should act in this respect in accordance with the purposes and the principles of the United Nations" (GAOR, 37th Session, Supplement No. 51 (A/37/51), p. 262, para. 8 of Principle I).

78/ In this sense, see A. Gianelli, Adempimenti preventivi, cit., Chap. 4, Sect. 1, paragraph 8.

procedures have been of no avail, any further unilateral action should not be taken without prior resort to the procedure envisaged in Articles 34 to 38 of the Charter;

(ii) Secondly, where the internationally wrongful act is of such a nature as to create a danger to international peace and security, a Member State of the United Nations may not resort to any kind of measures - not even to those not susceptible of endangering international peace and security (except, of course, for self-defence measures under Art. 51) - unless it has attempted to obtain cessation and reparation in a broad sense through those means, among those listed in Article 33, paragraph 1, which are available to it. The phrase "first of all" placed at the outset of the said Article deserves to be stressed;

(iii) Thirdly, it appears to be possible - thanks to the tenor of the relevant Charter Articles and to the de lege lata or ferenda support of paragraph I (8) of the Manila Declaration - to assume that the United Nations system may embody the principle which was set forth in some of the dispute settlement instruments pre-existing the Second World War. 79/ We refer to the principle according to which, pending actual opening of the envisaged procedures or pending the outcome of an initiated procedure, the injured State (a fortiori, of course, the law-breaking State) is under the obligation to refrain from any action (whether reprisals or retorsions) likely to make "more difficult or impede" the settlement which by the relevant procedure or procedures should be sought. The very general obligation of members, set forth in Article 2, paragraph 3, to settle disputes in a manner such as not to endanger "justice", as well as peace and security, could also be put to fruition in this light.

D. State practice since the Second World War

35. The contemporary practice of States conforms, at least in part, with the above understanding of legal developments subsequent to the Second World War.

(a) Conformity with the briefly outlined regime is to be found in a United States Government statement of 1954. A Chinese military tribunal had inflicted detentive penalties to a group of American airmen captured in Manchuria and charged them with espionage. The United States protested the allegedly unlawful action stating that the persons involved were members of the United Nations forces engaged in military operations in Korea and adjacent areas and the US Senate suggested a blockade of the whole Chinese coast with or without the consent of the United Nations. The US Administration, however, rejected the idea recalling the US obligation, deriving from the United Nations Charter, to "try to settle international disputes by peaceful means in such a manner that international peace is not endangered. Therefore

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79/ Supra, paragraphs 25-26 above.

our first duty is to exhaust peaceful means of sustaining our international rights and those of our citizens rather than resort to war action such as naval and air blockade of red China". 80/

(b) An interesting example is that of the so-called "cod fish wars" between Iceland and Great Britain. 81/ In August 1971 Iceland extended her exclusive fishing area from 12 to 50 miles and notified the United Kingdom its position with regard to the abrogation of the 1961 Treaty. The extension was immediately qualified as internationally unlawful by the United Kingdom which, following unsuccessful exchanges with the other party, presented, together with the Federal Republic of Germany, an application to the ICJ including a request for interim measures. It is well known that while Iceland decided not to appear, the Court did proceed to the indication of interim measures to the effect, inter alia, that the 12 miles limit should remain in force pending its final decision. Iceland refused to comply and contested the Court's jurisdiction. Only then, and following the negative outcome of further exchanges with the other party, did the United Kingdom engage in naval operations. A temporary settlement was subsequently reached between the two States on the fishing rights within the Icelandic 50 miles zone. Respect for the principles in question (negotiation, sommation and resort to available means of settlement) seems to have been clearly shown by the United Kingdom.

(c) Equally significant is the well-known position taken by the ICJ in the Hostages case with respect to the United States military attempt to rescue the hostages. The Court disapproved of the operation both as contrary to its previous Order ("that no action was to be taken by either party which might aggravate the tension between the two countries") and, mainly, because "an operation undertaken in those circumstances, from whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations". 82/. It is notably significant, in this case, that despite the

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80/ Keesing's, cit., pp. 13927-13928. The United States brought the case to the United Nations General Assembly, where a resolution entrusting the Secretary-General with the task of trying to obtain release of the airmen was adopted (905 (IX) of 10 December 1954). The frequency, in the cold war period, of cases where resort to settlement procedures has helped to avoid resort to unilateral measures has already been noted in paras. 12 supra. See also A. Gianelli, Adempimenti preventivi, cit., chap. IV, sect. II, paragraphs. 9-11 c.

81/ On the numerous episodes of this "war" see Keesing's, cit., pp. 12670, 15251, 16487-480, 17314, 17476, 18109, 25234-236, 25869-877, 25874, 26028-032, 26237-239, 27511-515, 27637-639, 27824-825.

82/ ICJ Reports, 1980, paragraph 93, p. 43. Judge Lachs in his separate opinion expressed himself more decidedly: "the Applicant having instituted proceedings, is precluded from taking unilateral action, military or otherwise, as if no case is pending" (ibid., p. 48). It should be recalled, however, that the United States resorted to their armed action by way of extrema ratio, following the failure of various peaceful attempts previously resorted to (supra, para. 13).

military nature of the operation the Court felt it necessary to emphasize not the fact that the measure could be envisaged as a violation of the prohibition of armed force but the fact that resort to the action in question was not in conformity with the obligation of a State not to jeopardize the outcome of a settlement procedure to which the injured State itself had submitted.

36. There are, however, a number of cases in which the requirement of prior resort to a settlement procedure - and abstention from reprisals pending the procedure's conclusion - have not, on the contrary, been complied with. These cases involved measures which were unlikely to affect significantly, either the respective positions of the injured and law-breaking State, or the maintenance of peace.

37. Typical examples of this are those measures which involve the freezing of assets of the alleged law-breaker or of its nationals. For instance, the United States repeatedly resorted to the freezing of bank deposits against States which had nationalized assets of American nationals without compensation. These measures were not preceded by attempts at amicable dispute settlement. 83/ Another instance is the one concerning the British and French freezing measures adopted without any prior attempt at peaceful settlement in response to the Egyptian nationalization of the Suez Canal Company as well as other measures concerning French and British nationals (1956). 84/ A similar case refers to the expropriation of British property by Libya in 1971 by way of reaction to the allegedly wrongful act committed by the United Kingdom in withdrawing from a number of Persian Gulf islands and thus allowing their occupation by Iran. The Libyan measure was adopted without any prior contact or communication. 85/ One should also recall the freezing of Iranian property and deposits following the 1979 taking of American hostages in Tehran; measures taken prior to the application to the ICJ and simultaneously with attempts at negotiation and the request for a meeting of the Security Council. It is well-known that the Court did not express, with regard to that course of action, the disapproval it did express with regard to the rescue operation later carried out by the United States. The ICJ thus implicitly indicated that it thought that the measures in question were not condemnable in the context within which they had been taken. 86/

38. Although the measures considered in the previous paragraph are frequently adopted without any prior settlement attempt, there are nevertheless some instances, even among those measures which appear to be unlikely to endanger the maintenance of peace, where the parties believe that some steps towards a

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83/ On these cases see again paragraph 16.

84/ M. Whiteman, Digest, cit., vol. 12, pp. 320-321.

85/ See supra, paragraph 16.

86/ Digest of US Practice in International Law, 1979, pp. 1471-1492; 1980, pp. 794-804.

peaceful settlement are required. In 1948, for example, Yugoslavia protested vehemently against the freezing of Yugoslav assets by the United States as a reaction to the expropriation of United States assets in Yugoslavia. The allegedly law-breaking State claimed the unconditional revocation of the United States measure, release of the assets constituting, according to Yugoslavia, an indispensable condition for the continuation of the negotiations (which were already under way) concerning the compensations due to dispossessed American nationals. Had the release not been granted, the Yugoslav Government threatened to submit the matter to the United Nations or the ICJ. 87/ Following the French nuclear explosion in the Algerian desert, in 1960, Ghana proceeded to the freezing of French assets in its territory. But prior to doing so the Ghanaian Government had repeatedly protested with the French Government and brought the question before the United Nations General Assembly, which adopted a resolution demanding cessation of nuclear tests. 88/ Equally interesting are the well-known cases of measures taken by States materially not affected by the infringement of erga omnes obligations in the course of the last decade. We refer to the measures adopted by the member States of the European Community against Iran during the Hostages crisis; by the same States and the United States against the USSR following the latter's intervention in Afghanistan; by British Commonwealth and European Community members and the United States against Argentina during the Falkland/Malvinas conflict and by some NATO States and Japan against the USSR following the Korean Jumbo tragedy. 89/

39. Although these cases concerned measures involving a limited degree of gravity (retorsions or suspension of specific treaty obligations), the reacting States, while not resorting to settlement procedures in a proper sense, have often not omitted to submit the issue to international institutions with a view to attempting to reach a solution in a diplomatic context. In the Hostages case, and in the cases of Afghanistan and the Falkland/Malvinas war there have been one or more pronouncements by the Security Council 90/ and the General Assembly. 91/ In the Korean Jumbo case the Council's resolution was vetoed by the USSR.

87/ Keesing's, cit., p. 9097, 9416. The United States, however, maintained their position and an agreement was ultimately reached concerning the compensation for expropriations and release of the "frozen" assets.

88/ Resolution 1379 (XIV) of 20 November 1959. See also Keesing's, cit., p. 17280.

89/ Some of these cases might be considered to be examples of international crimes, according to article 19 of the first part of the draft. We will return to this practice when dealing with the consequences of crimes.

90/ Security Council resolutions 457 of 4 December 1979 (Hostages): 502 and 505 of 3 April and 26 May 1982 (Falkland/Malvinas).

91/ See General Assembly resolution ES-62 of 14 January 1980 (Afghanistan).

40. An opposite position - according to which even existing dispute settlement obligations do not have, under general international law, any restrictive impact upon the injured State's faculté to take unilateral measures - seems to emerge rather firmly from the 1978 award concerning the Air Services Agreement case. According to France the unilateral United States measures "could have taken place [- both under the law of reprisals and the law of treaties -] only if the injured State had had no other means to ensure respect" for its rights infringed by an internationally wrongful act. 92/ The United States maintained that the French argument was valid only for armed reprisals: in any other case "[it] would represent a drastic change from the existing state of customary international law and could hardly be accepted until institutions of international adjudications have evolved to the point that there are tribunals in place with the authority to indicate interim measures of protection on an immediate basis". 93/ In conclusion, the United States "do not accept the proposition that an injured party must defer all action until after the outcome of an arbitration. This proposition finds no support in the theory of non-forcible reprisals ... and is likewise unsupported by treaty-law doctrine". 94/ The arbitral tribunal, for its part, based itself on the assumption that at the present stage of international law - and except for the "limits set by the general rules of development of international law pertaining to the use of armed force" or any limits deriving "from special obligations arising under particular treaties" - the injured State "is entitled ... to affirm its rights through 'countermeasures'" 95/ The tribunal concluded in particular that: (i) there was no rule prohibiting, in the presence of a mere obligation to negotiate, "the use of countermeasures during negotiations, especially where such countermeasures are accompanied by an offer for a procedure affording the possibility of accelerating the solution of the dispute"; 96/ (ii) no rule of general international law prohibits unilateral measures in cases where "there is arbitral or judicial machinery which can settle the dispute". Only "[i]f the proceedings form part of an institutional framework ensuring some degree of enforcement of obligations, the justification of countermeasures will undoubtedly disappear, but owing to the existence of that framework rather than solely on account of the existence of arbitral or judicial proceedings as such"; 97/ (iii) in cases where a special agreement (compromis) between the parties is required for an arbitral procedure to be set into motion, "it must be conceded that under present-day international law States have not renounced their right to take countermeasures ... [T]his solution may be preferable as it facilitates

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92/ ILR, vol. 54, 1971, p. 320.

93/ Digest of the US Practice in International Law, 1978, p. 773.

94/ Ibid., p. 774.

95/ ILR, vol. 54, 1979, p. 337.

96/ Ibid., p. 340, paragraph 91.

97/ Ibid., p. 340, paragraph 94.

States' acceptance of arbitration or judicial settlement procedures"; 98/ (iv) when the adjudicating body is "in position to act" and in the measure in which it possesses the actual power to order "interim measures of protection" one must admit "the disappearance of the power to initiate countermeasures", and "an elimination of existing countermeasures [shall take place] to the extent that the tribunal so provides as an interim measure of protection". 99/

E. Conclusion

41. Combined with the generality - and frequent vagueness - of treaty language, the uncertain status of practice and jurisprudence does not warrant easy conclusions with respect to the precise actual impact of dispute settlement obligations on the liberty of States to resort to reprisals. The following inferences can, however, be drawn from the practice in terms of lex lata:

(a) In the first place an injured State must refrain from unilateral measures that may jeopardize an amicable solution as long as it is not clear that the means of settlement other than negotiation at their disposal 100/ have not brought about or are not apt to bring about any concrete result;

(b) Secondly, whenever a settlement procedure susceptible of a binding decision is on the way before an international body, an injured State must refrain from any unilateral measure other than interim measures of protection until the said body has reached its decision and the law-breaking State does not comply therewith. Where the international body in question is endowed with the power to indicate or order interim measures of protection, the injured State must refrain from unilaterally adopting any such measures until the body in question has pronounced itself on its request for interim measures;

(c) It is instead doubtful whether the injured State is to refrain from unilateral measures also by the fact that it is legally entitled to resort unilaterally to a (binding or not binding) third party settlement procedure.

42. We can now turn to what our predecessor and the Commission have thought or proposed so far with regard to the matter.

98/ Ibid., paragraph 95.

99/ Ibid., p. 341, paragraph 96. The Tribunal adds: "As the object and scope of the power of the tribunal to decide on interim measures of protection may be defined quite narrowly, however, the power of the parties to initiate or maintain countermeasures, too, may not disappear completely" (ibid.).

100/ We are, of course, referring to inquiry, good offices, mediation, conciliation, resort to international institutions, arbitration or judicial settlement et alia.

43. According to draft article 10 as proposed by Riphagen, it would be unlawful for the injured State to resort to reprisals (as distinguished from reciprocity) "until it has exhausted the international procedures for peaceful settlement of the dispute available to it". This prohibition excluded "interim measures of protection taken by the injured State within its jurisdiction, until a competent international court or tribunal, under the applicable international procedure for peaceful settlement of the dispute, has decided on the admissibility of such interim measures of protection" as well as the "measures taken by the injured State if the State alleged to have committed the internationally wrongful act fails to comply with an interim measure of protection ordered by such international court or tribunal". The previous rapporteur thus accepted the Tribunal's view in the Air Services case, admitting measures favouring the effective submission of the dispute to third party settlement. 101/

44. The Commission's reactions to the proposed draft article 10 varied. Some members were in favour of excluding the settlement procedure requirement for reprisals performing a preventive function, 102/ some agreed with Professor Riphagen's position, 103/ while others considered this position too favourable to the "author" State (in view of the fact that the outcome of the procedure was not necessarily binding). 104/ Some members felt that the provisions of Article 33 of the Charter and of other contemporary instruments were such that an obligation of prior resort to means of settlement existed in all cases. Furthermore, they believed that an express reference to the

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101/ W. Riphagen, fourth report on State responsibility, in YBILC 1983, vol. II, Part One, paragraph 104, ff. (Riphagen also mentioned the resolution of the International Law Institute in support of draft art. 5); comment to draft article 10, in W. Riphagen, Sixth Report on State responsibility, YBILC 1985, vol II, Part One, pp. 11 ff.

102/ Barboza, YBILC 1983, vol 1, 1778th meeting, paragraph 2.

103/ McCaffrey, YBILC 1983, vol. 1, 1779th meeting, paragraph 36; Lacleta Muñoz, YBILC 1985, Vol. 1, 1899th meeting, paragraph 27 (linking Part Two to Part Three of the draft, and envisaging an effective settlement procedure); Jagota, ibid 1901st meeting, paragraph 10 (recommending that the effectiveness of the settlement procedures be expressly considered in the article).

104/ Flitan, YBILC 1985, vol I, 1893rd meeting, paragraph 8. He considered that "the Special Rapporteur said that the fact that a compulsory third-party dispute settlement procedure did not provide for a final and binding decision by the third party did not take away the compulsory character of the procedure itself, something that did not by any means follow from article 10. The question was, in that instance, why the compulsory character of the procedure itself should be maintained". Mahiou (ibid 1897th meeting, para. 13) suggested to allow measures having the purpose of speeding up the solution of the dispute.

competence of the Security Council should also be added. 105/ Finally, a number of members took the view that a greater precision was indispensable in order to specify the kind of settlement obligations to be considered relevant under the article. 106/

45. In the light of the preceding analysis of the practice, the Commission may notably prefer to render the relevant provision more articulate. This Special Rapporteur would be inclined to favour such a solution. In our view, the elements to be taken into account in the context of such an effort should be:

(i) the "intensity" of the relevant settlement obligation and the degree of availability of the contemplated procedure;

(ii) the degree of effectiveness of that procedure; and

(iii) the nature and objective function of the measure envisaged.

46. As regards the first element, the highest intensity of a settlement obligation is of course achieved when the procedure is so conceived as to be set into motion, if necessary, by a mere unilateral application by the allegedly injured party. This is the case of institutional procedures available by virtue of instruments of a general character or by virtue of the combined effect of such instruments with further bilateral or multilateral instruments. The first hypothesis is that of the Security Council or General Assembly mediation/conciliation procedure governed by Articles 35 to 38 of the Charter. The second hypothis is that of the judicial settlement before the ICJ under the general rules set forth in the Court's Statute as combined with agreements (compromissory clauses or general treaties) allowing for the possibility of a unilateral application or with the declarations made under the so-called optional clause. With reference to judicial settlement one should also recall the possibilities of unilateral initiative existing by virtue of provisions of the ICJ Statute contemplating accessory functions of the Court, such as the ones endowing the Court with [compétence de la compétence] (Art. 36, para. 6), with the power to indicate interim measures of protection (Art. 41), and others. A third possibility of unilateral initiative is represented by the infrequent cases where the obligation to resort to arbitration is accompanied by devices intended to ensure that the arbitral procedure be set into motion - failing the usually otherwise indispensable compromis - by a demand addressed by one of the parties to some permanent body, for the said body to set up the tribunal. In such a situation the arbitral tribunal once constituted, could also be unilaterally requested

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105/ Díaz-Gonzalez, YBILC, 1985, vol. 1, 1897th meeting, paragraph 47.

106/ Arangio-Ruiz, ibid, 1900th meeting, paragraph 19.

to indicate or order interim measures. Finally, the constitutive instruments of a number of international bodies do envisage settlement or quasi-settlement unilaterally initiable procedures. 107/

47. The second element - the effectiveness of the procedure - is present in a high degree in all "third party" settlement procedures leading to a binding result. This is the case, of course, of arbitration and judicial settlement, the latter not including and the former only very rarely including the possibility of indication of interim measures with binding force. A lower degree of effectiveness is obviously to be found in those numerous and varied mediation/conciliation procedures the most illustrious (although not the most frequently used) of which are the procedures before the two main political bodies of the United Nations. Varying degrees of effectiveness are present in classical good offices and mediation procedures, in ad hoc inquiries as well as in various regional dispute settlement systems. Common, albeit not always highly effective, are the dispute settlement or quasi-settlement procedures operating within the framework of specialized - universal or regional - international institutions. 108/

48. As regards the third element - the nature and the objective function of the measure envisaged, we believe that it should be taken into account in at least two respects:

(a) Firstly, countermeasures whose nature and weight would be likely to jeopardize a just solution should be inadmissible as long as amicable settlement or quasi-settlement procedures are available notwithstanding the low degree of their effectiveness. Also inadmissible would be, in all events, those measures which are in contrast with the general obligation not to endanger international peace and security and justice, as provided for by Article 2, paragraph 3 of the Charter of the United Nations;

107/ See, for example, the case of the Aerial Incident of 3 July 1988, in ICJ reports, 1989, p. 132 ff. The order of 13 December 1989, was brought by Iran against the United States also on the basis of article 84 of the Chicago Convention establishing the ICAO. This article states that: "(i)f any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council. No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. Any contracting State may, subject to article 85, appeal from the decision of the Council to an ad hoc arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. Any such appeal shall be notified to the Council within 60 days of receipt of notification of the decision of the Council".

108/ An instance is the example mentioned in ibid.

(b) In the second place, special attention should be accorded to those measures which, owing to their nature and function, are referred to as "interim measures of protection", i.e. measures apt to safeguard the injured State from the risk of not obtaining reparation (lato sensu), or - when a wrongful act of a continuing character has not yet ceased - apt to prevent the continuation of the unlawful conduct. 109/ In our view, the adoption of such measures would not be in contrast with the "previous exhaustion of available settlement procedures" requirement, at least until the admissibility and content of interim measures of protection has been decided upon by an international body under an applicable settlement procedure. 110/

49. The incidence of compliance with settlement obligations upon the lawfulness of reprisals is obviously not unrelated to the dispute settlement provisions to be adopted - as compromissory clauses - within the framework of Part Three of the project on State Responsibility. With respect to the contents of those provisions, a considerable difficulty will admittedly have to be faced in view of the "naturally" very extensive area that would be covered by compromissory clauses eventually to be embodied into a codification convention on State responsibility. Everybody is aware of the fact that such a convention would cover any subject matter which may be the object of an alleged breach of an international obligation. It is therefore likely that States will be in principle more reluctant to undertake far-reaching third party settlement obligations than they would be with reference to any specific area of the law of nations codified so far. The fact that any settlement obligations provided for in Part Three would obviously limit the area in which the liberty of an allegedly injured State to resort to reprisals would be

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109/ See on this point supra paragraph 5.

110/ "Objective" qualifications such as the ones just mentioned - i.e. "measures likely to be detrimental to a just settlement", or "likely to endanger peace, security and justice"; and "interim measures of protection" - might offer more reliable criteria than those distinctions which are based on the aim subjectively pursued by the injured State, such as the distinction between coercive, protective and executive measures. Indeed, the available data does not offer any defendable criteria with regard to the degree of relevance of any distinctions between the aims or purposes - protective, coercive or executive - in pursuance of which measures may be taken by the injured State, in view of the impact of settlement obligations upon the lawfulness of unilateral measures. As a matter of fact, any given measure may pursue two or more of such aims at the same time. We have found no concrete cases in which the evaluation of the lawfulness of a measure (in its relationship with a dispute settlement obligation) was clearly made dependent upon the aim pursued by the injured State. To be sure, the phrase "interim measures of protection" does appear in the Air Services Agreement award. That phrase is, however, used with reference to the action of the adjudicating body and not with reference to the injured party's action. It indicates a distinct act, phase or purpose of the arbitral procedure. The "objective" meaning of interim measures of protection as understood by us has been already discussed supra paragraph 5.

affected by the requirement of prior resort to available settlement procedures is bound to increase States' reluctance to broaden their third party and other settlement commitments. We shall do our best to take due account of these easily forseeable difficulties within both the present portion of Part Two and in Part Three.

50. On the other hand, the very factor considered in the preceding paragraph enhances the importance of attempting an adequate development of the law of dispute settlement within the framework of both Parts Two and Three of the project. States must be made to realize that the law of State responsibility will acquire a higher degree of fairness, balance and effectiveness which, in our view, is indispensable, unless they accept substantial improvements in the field of amicable settlement procedures. Indeed, in the absence of institutional remedies, unilateral measures are, for a long time, bound to remain the core of the legal régime of State responsibility. The effective implementation of such consequences of internationally wrongful acts as cessation and reparation will, in the final analysis, rest on reprisals. Implementation, however, must not only be effective, it must also be just: and for justice to be secured at the stage of implementation the system of reprisals must be mitigated by adequate settlement procedures. This is in the interest of both sides. The allegedly law-breaking State must find in settlement procedures a guarantee against unfounded or unreasonable claims on the part of the allegedly injured State. The latter State must find in settlement procedures a guarantee of early cessation of the wrongful conduct and of adequate reparation of the effects thereof. Both sides have a clear interest in making settlement procedures as adequate as possible, whatever the instinctive general reluctance of all States to commit themselves.

51. The considerations set forth in the preceding paragraph should be taken into account, most particularly, by the governments of those States - the great majority - whose economic, political or military weakness puts them at a disadvantage, whether they are in the position of allegedly injured State or of alleged law-breaker. The Commission should therefore do its best, in dealing with the problem of dispute settlement in Parts Two and Three, not only to draw as much as can in our view be drawn from the commitments embodied in the Charter and other instruments but also to proceed more imaginatively to the highest possible degree of progressive development. Contemporary trends at the universal and regional level do seem to show a few encouraging, albeit modest, signs. 111/

111/ In addition to the developments described supra, paragraph 33, it is perhaps useful to recall the prospects which seem to emerge within the Conference on Security and Cooperation in Europe (CSCE). See, for example, the Report of the CSCE Meeting of Experts on Peaceful Settlement of Disputes (adopted at Valletta, 8 February 1991), in ILM 1991, pp. 382 ff. Of particular interest here are draft paragraph 4: "The participating States will seek to prevent disputes and to develop, utilize, and improve mechanisms designed to prevent disputes from occurring, including, as appropriate, arrangements and procedures for prior notification and consultation, regarding

actions by one State likely to affect significantly the interests of another State"; draft paragraph 5: "Should disputes nevertheless occur, the participating States will take particular care not to let any dispute among them develop in such a way that it will endanger international peace and security, and justice. They will take appropriate steps to manage their disputes pending their settlement. To that end, the participating States will: (a) address disputes at an early stage; (b) refrain throughout the course of a dispute from any action which may aggravate the settlement of the dispute; (c) seek by all appropriate means to make arrangements enabling the maintenance of good relations between them, including, where appropriate, the adoption of interim measures which are without prejudice to their legal positions in the dispute"; and draft paragraph 6: "As laid down in the Helsinki Final Act and subsequent relevant documents, the participating States will endeavour in good faith and in a spirit of cooperation to reach a rapid and equitable solution of their disputes on the basis of international law, and will for this purpose use such means as negotiation, inquiry, good offices, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice, including any settlement procedure agreed to in advance of disputes to which they are parties. To that end, the participating States concerned will in particular: (a) consult with each other at as early a stage as possible; (b) in case they cannot settle the dispute among themselves, endeavour to agree upon a settlement procedure suited to the nature and characteristics of the particular dispute; (c) where a dispute is subject to a dispute settlement procedure agreed upon between the parties, settle the dispute through such procedure, unless they agree otherwise; (d) accept, in the context of the CSCE Procedure for Peaceful Settlement of Disputes and its scope of applicability, the mandatory involvement of a third party when a dispute cannot be settled by other peaceful means". (More in general, for interesting analyses of the issue of peaceful settlement of international disputes in Europe, see the volume "The Peaceful Settlement of International Disputes in Europe: Future Prospects", Hague Workshop, 1990).

A further source of inspiration should be the Report of the International Court of Justice to the General Assembly (doc. A/46/PV.44 of 12 November 1991). Sir Robert Jennings, after having drawn attention to the full docket of the Court (11 cases at that moment), pointed out how the Court could perform an even more active role in the settlement of disputes if its advisory jurisdiction were more widely recurred to both by States and by the organs of the United Nations. Sir Robert stressed that even disputes of a highly political nature, such as the Iraq-Kuwait dispute before the invasion, present legal aspects, a non-binding pronouncement on which might help their resolution through other means (conciliation, negotiation). This suggestion was gladly accepted by the Secretary-General, Mr. Pérez de Cuéllar (ibid).

CHAPTER III

PROPOSED DRAFT ARTICLES

52. The following are the draft articles proposed by the Special Rapporteur:

Article 11

Countermeasures by an injured State

An injured State whose demands under articles 6 to 10 have not met with adequate response from the State which has committed the internationally wrongful act is entitled, subject to the conditions and restrictions set forth in the following articles, not to comply with one or more of its obligations towards the said State.

Article 12

Conditions of resort to countermeasures

1. Subject to the provisions set forth in paragraphs 2 and 3, no measure of the kind indicated in the preceding article shall be taken by an injured State prior to:

(a) the exhaustion of all the amicable settlement procedures available under general international law, the United Nations Charter or any other dispute settlement instrument to which it is a party; and

(b) appropriate and timely communication of its intention.

2. The condition set forth in subparagraph (a) of the preceding paragraph does not apply:

(a) where the State which has committed the internationally wrongful act does not cooperate in good faith in the choice and the implementation of available settlement procedures;

(b) to interim measures of protection taken by the injured State, until the admissibility of such measures has been decided upon by an international body within the framework of a third party settlement procedure;

(c) to any measures taken by the injured State if the State which has committed the internationally wrongful act fails to comply with an interim measure of protection indicated by the said body.

3. The exceptions set forth in the preceding paragraph do not apply wherever the measure envisaged is not in conformity with the obligation to settle disputes in such a manner that international peace and security, and justice, are not endangered.

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FOURTH REPORT ON STATE RESPONSIBILITY

by

Mr. Gaetano ARANGIO-RUIZ, Special Rapporteur

Addendum

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CHAPTER IV. PROPORTIONALITY OF COUNTERMEASURES

53. As indicated in our Third Report, the relevance of proportionality in the regime of countermeasures is widely accepted by both doctrine and jurisprudence. 112/ Clarification is necessary with regard to: the precise content of the principle with regard to its strictness or flexibility and with regard to the criteria on the basis of which proportionality should be assessed.

54. In so far as the first point is concerned, it is rather unusual that in the context of inter-State practice reference be made, either by the reacting State or by the State against which measures are being taken, to equivalence or proportionality in a narrow sense. 113/ Considering that the function of the principle is to avoid the possible inequitable result of the use of countermeasures, it is understandable that a rigid notion of proportionality

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112/ Third Report, cit., paras. 63-68.

113/ An example could perhaps be the tariff measure adopted by the United States in 1987 with regard to Japanese electronic goods following an alleged failure by Japan "to honour a five-year bilateral accord on the pricing of semiconductors (microchips). ... The action followed the adoption of unanimous resolutions by both House and Senate calling for retaliation for violation of the accord. ... In announcing the tariffs ... the United States Secretary of Commerce, remarked that Japan was an 'ally and a friend' and that 'nobody in the administration is very happy about having to do this'. Japan stated that it would challenge the imposition of the tariffs under the rules of the GATT ...". President Reagan on 8 June 1987, announced a reduction of $51,000,000 in the value of merchandise affected by the measure, "this reduction being described as 'strictly proportional' to the degree to which Japanese manufacturers had adjusted their prices in accordance with the United States concept of 'fair value'" (Keesing, cit., p. 35331). More generally, a rigid assessment of proportionality of measures and countermeasures seems to be the one provided for by the GATT system. On the point, see, L. BOISSON DE CHAZOURNES, Les contre-mesures dans les relations internationales économiques, doctoral thesis, University of Geneva, November 1990, Chapter III, Section C. Cases in which States appear to apply the principle of proportionality in a narrow sense are, in our view, those in which they adopt so-called "reciprocity measures" (Third Report, cit., paras. 28-32). However, the admissibility in these cases not only of "reciprocity measures" but also of measures "not strictly proportional" (equivalent) to the wrongful act and - as indicated in Chapters I and II of this Report - the absence of any difference, from the point of view of the impact of dispute settlement obligations, of the requirement of a previous demand of reparation or of a previous intimation, between "reciprocity measures" on the one hand, and measures "not strictly proportional" on the other hand, lead us to agree with those authors according to whom "reciprocity measures" are not distinct from other forms of countermeasures and are subject to the same conditions and restrictions (see, Third Report, cit., para. 31).

should have appeared unsuitable. The "negative" formulations adopted, for instance, in the Naulilaa and Air Services awards are therefore preferable. 114/ Our distinguished predecessor seems to have relied on the same understanding of the principle in paragraph 2 of his draft article 9, according to which a countermeasure "shall not, in its effects, be manifestly disproportionate to the seriousness of the act". 115/ On the other hand, we agree with the doubts concerning the use of the term "manifestly" expressed by a number of State representatives in the Sixth Committee of the General Assembly. 116/ While the assessment of the proportionality of a countermeasure must certainly involve consideration of all elements deemed to be relevant in the specific circumstances, the influence of the said expression ("manifestly") could have the effect of introducing an element of uncertainty and subjectivity in the construction and application of the principle. 117/ We are inclined to favour expressions such as "out of proportion" or simply "disproportionate". 118/

55. The second issue to be considered concerns the criteria of proportionality. For the same reasons given above, namely the need to ensure that the adoption of countermeasures do not lead to any inequitable results, we feel that proportionality is to be assessed taking into account not only the purely "quantitative" element of damage caused, but also what we might call "qualitative" factors such as the importance of the interest

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114/ According to the award in the Naulilaa case, "on devrait certainement considérer comme excessives et partant illicites, des représailles hors de toute proportion avec l'acte qui les a motivées" (UNRIAA, vol. II, p. 1028). In the Air Services award the arbitrators held the United States measures to be in conformity with the principle of proportionality because they "do not appear to be clearly disproportionate when compared to those taken by France" (International Law Reports, vol. 54, 1979, p. 338). In the Commission, Calero Rodrigues expressed himself decidedly in favour of the inclusion of a "negatively" formulated requirement of proportionality in the draft articles concerning countermeasures (see, YBILC 1982, vol. I, 1734th meeting, para. 36).

115/ W. Riphagen, Sixth Report on State Responsibility, YBILC 1985, vol. II (Part One), draft article 9, para. 2, and comment thereto.

116/ See, in particular, the statements made by the representatives of France (A/C.6/37/SR.38), Greece (ibid., SR.40), Finland (ibid., SR.45), Algeria (ibid., SR.48) and Morocco (ibid., SR.50).

117/ The same holds true for the expressions "hors de toute proportion" used in the Naulilaa award and "clearly disproportionate" in the Air Services award.

118/ In the same sense in Article 905, para. 1 (b), of the Restatement of the Law Third, cit., according to which an injured State "may resort to countermeasures that might otherwise be unlawful, if such measures ... (b) are not out of proportion to the violation and the injury suffered".

protected by the rule infringed and the seriousness of the breach. 119/ This appears to be in line with the position emerging from the 1934 International Law Institute (ILI) resolution on reprisals 120/ and, more recently, from the award in the Air Services case 121/ and the proposals made by our predecessor. 122/

56. A different matter is the possible relevance of the aims pursued by the allegedly injured State in resorting to countermeasures. Although, as explained in Chapter I of this Report, 123/ the aims - or rather the functions - of an act of reprisal could be of relevance in deciding whether and to what extent the measure is lawful, this issue is different from that of proportionality. Proportionality, even if not understood in a strictly "quantitative" sense, is in all events a relationship between the two evils represented by the breach and the reaction thereto. It is not to be measured, therefore, on the basis of the aptness of the reaction to attain a particular aim.

119/ In this understanding we agree with our distinguished predecessor's opinion according to which "quantitative" and "qualitative" proportionality would not be separable (see, W. Riphagen, Preliminary Report on State Responsibility, YBILC 1980, vol. II (Part One), paras. 94-95).

120/ According to the resolution of the ILI the acting State must "proportionner la contrainte employée à la gravité de l'acte dénoncé comme illicite et à l'importance du dommage subi" (Article 6, para. 2, in Yearbook ILI, vol. 38, 1934, p. 709).

121/ In that award the arbitrators held that "it is essential, in a dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach" (International Law Reports, vol. 54, 1979, p. 338).

122/ According to draft article 9, para. 2, proposed by Professor Riphagen, "[t]he exercise of [the right to resort to reprisals] by the injured State shall not, in its effects, be manifestly disproportional to the seriousness of the internationally wrongful act committed" (Sixth Report on State Responsibility, cit.).

123/ See, supra, doc. A/CN.4/444, paras. 3-5.

CHAPTER V. PROHIBITED COUNTERMEASURES

57. Our Third Report summed up the main issues arising, with regard to countermeasures, from: (a) the prohibition of the use of force; (b) respect for human rights; (c) diplomatic law and (d) peremptory and erga omnes rules. 124/ Although some of the issues under (a), (b) or (c) are covered by imperative or erga omnes rules, it is preferable to continue to deal with them separately in view of the importance acquired in particular, in our time, by the prohibition of the use of force and the protection of human rights.

A. Countermeasures and the prohibition of the use of force

58. Although this Special Rapporteur is not fully convinced that the prohibition of the use of force under Article 2, paragraph 4 of the Charter has really acquired the rank of a rule of general international law, he deems it indispensable to assume - in conformity with the pronouncements of the International Court of Justice and the practically unanimous view of scholars 125/ - that such is the case. Were it not so, such a general rule would have to be affirmed in any case as a matter of progressive development of the law of State responsibility.

59. The trend towards the restriction of resort to armed reprisals, which had already emerged before the Covenant and the Briand-Kellogg Pact, may be considered to have attained its target, at the level of conventional law, with the entry into force of those two "anti-war" treaties. Notwithstanding some ambiguities in the relevant rules - particularly in the Covenant - those two treaties may be reasonably interpreted, the former in the sense of restricting, the latter in the sense of forbidding resort to "forcible measures short of war" prior to exhaustion of peaceful means of redress. 126/

124/ Third Report, cit., paras. 96 ff.

125/ Ibid., paras. 97 ff. (especially notes 179 ff.).

126/ Of course, the Covenant did not explicitly refer to measures "short of war". More specifically, it condemned resort to war: (a) prior to the experiment of one of the peaceful means envisaged in the Covenant; (b) during the three months following an arbitral award or a judgment of the PCIJ or a report of the League Council (Article 12); (c) against the member State abiding by the arbitral or Court decision (Article 13); (d) against any State abiding by a unanimous report of the Council or a qualified majority report of the Assembly (Article 15). Outside these hypotheses - and subject to the controversial impact of the duty of respect and protection of the territorial integrity of all the members (Article 10) - war was not unlawful, (see, L. FORLATI PICCHIO, La sanzione, cit., pp. 108-109 and footnote 17). It was, however, held by a number of authorities that the prohibition of war in the said hypotheses included the prohibition of military measures "short of war". See, for example, J. BRIERLY, Règles générales du droit de la paix, Hague Rec., 1936-IV, p. 124, and, for a survey of opinions, I. BROWNLIE, International Law and The Use of Force, cit., p. 220 ff. This position

This appears to be a correct construction of the combined effect of the provisions of the two treaties concerning the prohibition of force, on the one hand, and the obligation to attempt a peaceful settlement, on the other. This construction of the conventional law situation is confirmed by the practice of the inter-war period. Unlike what was done in the previous period, States resorting to armed measures declared that they were acting in self-defence. 127/ It must be further recalled that resort to force was also being condemned, albeit under the different denomination of forcible intervention, in the American hemisphere, 128/ for instance by the "Saavedra Lamas" Treaty of 1933. 129/

60. It is well known that while the League Covenant restricted resort to force, the United Nations Charter firmly prohibits it altogether, except in self-defence under Article 51. The Founding Fathers of the Charter certainly intended to condemn - and in fact condemned - the use of force even if resorted to in the pursuit of one's rights. 130/ We are therefore unable to

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apparently found some support in the cited opinion of the Committee of Jurists consulted by the League following the Janina (Tellini) case, where the admissibility of forcible measures short of war was made conditional upon a decision of the Council (in the light of Articles 13-15 of the Covenant).

As for the Briand-Kellogg Pact, it condemned war in Article 1 and in Article 2 and prescribed the settlement of disputes by peaceful means (LNTS, vol. 94 (1929) pp. 59-64).

127/ I. BROWNLIE, International Law and the Use of Force, cit., pp. 19 ff.; P. LAMBERTI ZANARDI, La legittima difesa nel diritto internazionale, Milan, 1972, pp. 39 ff., and p. 87.

128/ On the parallelism of this development (mutatis mutandis) with the European anti-war trend, see, inter alios, G. ARANGIO-RUIZ, The Normative Role of the General Assembly and the Declaration of Friendly Relations, Hague Rec., vol. 137, 1972-III, pp. 547 ff.

129/ Article 1 of that treaty provided "that the settlement of disputes or controversies of any kind that may arise among them shall be effected only by the pacific means which have the sanction of international law", while Article 3 specified that "in no case shall [the Contracting Parties] resort to intervention, either diplomatic or armed". (UN Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928-1948, p. 1039). See again supra, Doc. A/CN.4/444, para. 25. The Declaration made in the Eighth Conference of American States in Lima (1938) is also very clear in reiterating the unlawfulness of all use of force, including armed reprisals. It states "once again" that "All differences of an international character should be settled by peaceful means" and that "The use of force as an instrument of national or international policy is proscribed" (text in AJIL, vol. 34, 1940, Supp., pp. 197-201).

130/ On the proceedings of the San Francisco Conference, see, P. LAMBERTI ZANARDI, La legittima difesa, cit., p. 143 ff., and R. TAOKA, The Right of Self-defence in International Law, Osaka, 1978, p. 105 ff.

share the view according to which armed reprisals would not be condemned in so far as they were used not against the territorial integrity and political independence of any State (or in any manner incompatible with the purposes of the United Nations) but for the restoration of an injured State's right. 131/

61. The prohibition of armed countermeasures under Article 2 paragraph 4 is the object of explicit pronouncements on the part of States. The main one of these is the well-known Friendly Relations Declaration, by which the United Nations General Assembly unanimously proclaimed that "States have a duty to refrain from acts of reprisals involving the use of force". 132/ This position is implicitly confirmed by the General Assembly resolution on the definition of aggression, where it is specified that "[n]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression". 133/ The last sentence, we believe, means that not even a legal consideration such as the one relating to the pursuit or protection of one's right would justify resort to one of the actions referred to in Article 3 of the cited resolution. 134/ During the drafting of the

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131/ On the doctrine in question, originally formulated by E.S. Colbert and, especially by J. Stone, see, Third Report, cit., para. 98 and note 182.

132/ R. ROSENSTOCK, "The Declaration of Principles of International Law concerning Friendly Relations: A Survey", in AJIL, vol. 65, 1971, p. 713 ff., p. 726.

The prohibition reiterated in General Assembly resolution 36/103 of 9 December, 1981, on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, which refers "the duty of a State to refrain from armed intervention, subversion, military occupation or any other form of intervention and interference, overt or covert, directed at another State or group of States, or any act of military, political or economic interference in the internal affairs of another State, including acts of reprisal involving the use of force" (Annex to resolution 36/103, Sect. II, para. C).

133/ Article 5.1 General Assembly resolution 3314 (XXIX) of 14 December 1974.

134/ Article 3 of General Assembly resolution 3314 (XXIX) of 14 December 1974 lists the forms of aggression (invasion or attack by the armed forces of a State of the territory of another State, bombardment, blockade of the ports or coasts, attack on military forces of another State, the use of armed forces of one State which are in the territory of another State, without the consent of the latter, the action of a State allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State, the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above).

resolution on the definition of aggression, an attempt was made - without success - to broaden the concept of armed attack - and consequently of self-defence - in order to include in the exception the protection of nationals abroad, on one side, and intervention in favour of the self-determination of dependent peoples, on the other side. Neither of these hypotheses, however, concerns the protection of a State's rights by means of reprisals. 135/ The condemnation of armed reprisals is also present, albeit indirectly, in the assertion by the International Court of Justice - in the Military and Paramilitary Activities in and against Nicaragua case - of the customary nature of the provisions of the Friendly Relations Declaration condemning the use of force. 136/

62. There is of course the question whether the failure to implement that core of the United Nations collective security system which is represented by Articles 42 to 47 would not justify an "evolutionary" interpretation of the Charter (as well as of the corresponding general rule of international law) with regard to the condemnation of the use of force. We refer to the doctrine according to which that persistent gap would justify an interpretation under which the prohibition laid down in Article 2 paragraph 4 of the Charter would be subject not only to the exception envisaged in Article 51 but also to other exceptions not expressly provided for therein. 137/ We shall see, however, that such a doctrine (whether or not one accepts it) would only cover those hypotheses in which resort to force might be justified by those grave emergency situations for which Articles 42 to 51 of the Charter were devised; and such situations may call for a broadening of the concept of self-defence, not for an exception to the prohibition of armed countermeasures against an internationally wrongful act. This seems to be demonstrated, in our view, by the practice to which we revert in the following paragraphs. While this practice does seem to affect the concept of self-defence - in the sense of broadening this concept in order to fill the gap left by the failure

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135/ They are about rescue or help operations in favour of nationals or peoples in danger or under duress. The same line (trend) has emerged more recently within the Special Committee for the Enhancement of the Prohibition of Force. In 1987 the "Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations" was finally adopted, see General Assembly resolution 42/22 of 18 November 1987, according to which: "No consideration of whatever nature may be invoked to warrant resorting to the threat or use of force in violation of the Charter" (Annex to the cited resolution, Sect. I, No. 3).

136/ ICJ Reports, 1986, paras. 188, 190, 191, pp. 89-91.

137/ Third Report, cit., para. 98

to complete the implementation of the collective security system - it appears less likely to warrant the notion that armed force can be lawfully resorted to by way of reprisals. 138/

63. The prohibition of armed reprisals is further evidenced by the fact that States resorting to force do not attempt to demonstrate the lawfulness of their conduct by qualifying it as a reprisal: they refer instead to self-defence. This was, for example, the position France and the United Kingdom appeared to take during the Suez crisis of 1956. 139/ A similar position was taken by the United Kingdom (1964) in order to justify the bombarding of a Yemenite locality following a violation by Yemen of the South-Arabian Federation's airspace. Before the Security Council - which explicitly condemned the action as an armed reprisal - the British Government used a plea of self-defence which was rejected for lack of immediacy of the reaction. 140/ It is interesting to note that the United Kingdom refrained

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138/ This position has recently been supported by A.L. SICILIANOS, Les réactions décentralisées à l'illicite: des contre-mesures à la légitime défense, Paris, 1990, pp. 398 ff.

According to the Restatement of the Foreign Relations Law of the United States, "[t]he threat or use of force in response to a violation of international law is subject to prohibitions on the threat or use of force in the United Nations Charter, as well as to Subsection (1)". The subsection in question specifies that "a State victim of a violation of an international obligation by another State may resort to countermeasures that might otherwise be unlawful, if such measures (a) are necessary to terminate the violation or prevent further violation, or to remedy the violation; and (b) are not out of proportion to the violation and the injury suffered" (Restatement of the Law Third, cit., n. 905 (2), p. 380).

139/ Both Governments took the position that "As is well known, Great Britain and France are the main users of this Canal, and our vital interests would be endangered if free passage were interrupted" (in SCOR, 11th year, 751st meeting, 31 October 1956, p. 8, para. 46); reference should also be made to the Statement by France (ibid., para. 61). On this occasion the United States declared that the circumstances prevented speaking of self-defence and that it was a case of armed attack (Repertory of Practice of United Nations Organs, Supp. No. 2, vol. I, Articles 1-8 of the Charter, New York 1964, p. 113, para. 160).

140/ See, Doc. S/RES/188 (1964), in which the Council "1. Condemns reprisals as incompatible with the purposes and the principles of the United Nations. 2. Deplores the British military action at Harib on 28 March 1964". The discussion which took place is reported in SCOR, 19th year, 106th-111th meetings.

One may here recall the numerous cases of violation of national airspaces by military aircrafts belonging to States of the different "bloc" which occurred during the first years of the cold war. In a number of these cases,

from vetoing the Council's resolution and declared that it did not object to the first operative paragraph which stated that the Security Council "[c]ondemns reprisals as incompatible with the purposes and principles of the United Nations", since "the action [in question] was not a reprisal or retaliation". According to the representative of the United Kingdom: "The purpose of our action at Harib Fort which we regarded as falling under Article 51 of the Charter, was wholly defensive in order to prevent further attacks against the territorial integrity of the South Arabian Federation and its inhabitants". 141/

64. In many cases armed force appears to have been resorted to by way of reaction to terrorist acts. Despite the absence of the immediacy requirement - the action having been taken in some instances months after the attack or even by way of prevention of future attacks - the acting States almost invariably invoke self-defence in order to justify their forcible action. Israeli incursions into neighbouring States in the late sixties and early seventies have inspired discordant doctrinal positions. 142/ Whatever the merits of these episodes from other points of view, it must be stressed that here again, as in the cases considered earlier in this Chapter, the justification given by the acting State before the Security Council - a highly questionable justification from the legal point of view - was the right of

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the aircraft was shot down. In the well-known U2 case, for instance, a United States military aircraft was shot down by the USSR forces (1960). The case was brought before the Security Council by the Soviet Union (SCOR, 15th year, 860th meeting, 26 May 1960). Cases of this kind raise some doubts as to their qualification. On the one hand, the existence of a territorial violation is clear, but on the other hand, it is more doubtful whether such a violation constitutes a real aggression and justifies an immediate armed reaction. It is here important to stress that the States concerned did not invoke the notion of reprisal in support of their armed reaction to the violation of their airspace, but referred instead to self-defence. Unfortunately some incidents have concerned civil aircraft as well (the EL AL airplane shot down by Bulgaria in 1955; the forced landing - and consequent disintegration - of a Libyan civilian airplane by Israel in 1973; the South-Korean Boeing shot down in 1983 by the Soviet Union). In these cases, reference to self-defence is much more debatable. On this practice, see A. GIANELLI, Adempimenti preventivi, cit., Chapter IV, No. 10 I (a) and (c).

141/ In SCOR, 19th year, 1111st meeting, 9 April 1964, p. 6, para. 29. On this occasion the United States stated their disapproval of "provocative acts and retaliatory raids in situations such as that before us" (Ibid., pp. 1-2, para. 4).

142/ Third Report, cit., para. 98.

"self-defence": where self-defence was understood as the right to protect the life and security of nationals within the country against attacks brought from bases situated in foreign territory. 143/ The same line of reasoning has been taken with respect to more recent episodes, such as the raid against PLO Headquarters in Tunis in 1985. 144/ While rejecting the "self-defence" justification, the Security Council condemned the said actions qualifying them explicitly either as armed reprisals or, more generally, as military actions. 145/ Following the bombardment of Libyan localities by the

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143/ See the Statement by the Israeli delegation in SCOR, 23rd year, 1407th meeting, 24 March 1968, p. 21, para. 215, relating to some incidents which had occurred in Jordan; the Statement by the Israeli representative in SCOR, 23rd year, 1462nd meeting, 31 December 1968, pp. 10-11 (attack against the civilian airport in Beirut); the letter of the Israeli Government of 10 April 1973, doc. S/10912 (incursion into the Lebanon). See also Repertory of Practice of United Nations Organs, Supp. N. 2, vol. I, New York 1964, p. 112, para. 156. Episodes concerning Israeli actions brought before the Security Council are numerous and have led to a number of resolutions of condemnation, at times formulated in a contradictory manner, such as S/Res.101 of 24 November 1953; S/Res.111 of 19 January 1956; S/Res.228 of 25 November 1966; S/Res.265 of 1 April 1969; S/Res.270 of 26 August 1969; S/Res.279 of 12 May 1970; S/Res.280 of 19 May 1970; S/Res.285 of 5 September 1970; S/Res.294 of 15 July 1971; S/Res.313 of 28 February 1972; S/Res.316 of 26 June 1972; S/Res.332 of 21 April 1973; S/Res.347 of 24 April 1974; S/Res.425 of 19 March 1978; S/Res.509 of 6 June 1982.

On this practice, see A. SICILIANOS, Les réactions décentralisées, cit., p. 413 ff.

144/ See the statement of the Israeli representative to the Security Council meeting of 4 October 1985 (provisional document S/PV.2615, pp. 86-87) justifying the violation of Tunisian sovereignty: "The PLO got in Tunisia an extraterritorial base from which they conducted their terrorist operations. We have struck only at this base ... Tunisia knew very well what was going on in this extraterritorial base, the planning that took place there, the missions that were launched from it, and the purposes of those missions; repeated armed attacks against my country and against innocent civilians around the world". The Israeli representative continued stating his Government's concern "with the prevention of future crimes" and further indicating its "aim to weaken and to destroy the nerve-centre of world terror".

145/ On other occasions the Council was unable to adopt any decision. For an analysis of the Council's resolutions, see A. SICILIANOS, Les réactions décentralisées, cit., p. 413 ff., who considers that it is not possible to conclude in favour of a certain admissibility or even just tolerance, in the presence of certain requisites, of armed reprisals in the Council's practice. This author notes that, on the contrary, several States have expressly ruled out the lawfulness of armed reprisals. See, for instance, the Statement by the Pakistani representative during the debate concerning an Israeli raid in Jordan (SCOR, 23rd year, 1407th meeting, 24 March 1968, p. 6): "The Security Council cannot tolerate military reprisals, much less a massive

United States in 1986, the United States Government stated that it had acted under Article 51 of the Charter in response to terrorist acts. 146/ South Africa, for its part, justified incursions into the territories of its African neighbours in the eighties as reactions to acts of terrorism. 147/

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pretext of retaliation against alleged acts of terrorism or sabotage". Paraguay used similar terms with reference to the situation in the Middle East (in United Nations doc. S/PV.1470, March 29, 1969, p. 4, para. 37: "We do not accept the doctrine of the right of reprisal whereby a State can presumably arrogate itself the right to carry out military operations of the kind now being considered by the Council in the territory of the other State".

146/ The bombing which took place on 15 April followed the explosion of a bomb, on 5 April in a discotheque in East Berlin whose main customers were mostly United States soldiers, which caused deaths and wounded. The Libyan Embassy in Berlin is alleged to have announced the act in advance. On 27 December 1985, other attacks had taken place in the airports of Rome and Vienna. The United States stated they had proof of Libyan responsibility and qualified their action - directed against terrorist bases - as a case of self-defence which was perfectly consistent with Article 51 of the United Nations Charter (letter from the United States representative to the Chairman of the Security Council, in AJIL, vol. 80, 1986, p. 632). The United Kingdom took the same position, which however remained isolated even within the Western group (other Western countries simply adopted measures of retorsion against Libya). While during the Security Council debate several States strongly criticized the United States action (see, for instance, the statements by the representative of Yugoslavia who "condemns most strongly this armed attack", in doc. S/PV.2676, 15 April 1986, pp. 9-10, and Hungary, according to which "the isolated suggestion that the armed attack carried out by the United States was an act of self-defence is nothing but an ill-conceived attempt to justify the illegitimate and to misinterpret another clear rule of law", in S/PV.2677, 16 April 1986, p. 32), the General Assembly adopted a resolution of condemnation (General Assembly resolution 41/38, of 20 November 1986). See, also the Declaration of the Assembly of Heads of State and Government of the Organization of African Unity on the aerial and naval military attack against the Socialist People's Libyan Arab Jamahiriya by the present United States Administration in April 1986 (79 votes in favour, 28 against, 33 abstentions, 19 absent). On this case, see KEESING's, cit., pp. 34083, 34144, 34337; Chronique des faits internationaux, in RGDIP, 1986, p. 981 ss., 1005 ff.; 1987, pp. 613-614.

147/ We refer to a number of episodes. Actions were usually directed against bases of the African National Congress. With reference to the Maser (Lesotho) incursion of 19 December 1985, when nine people who were connected with the ANC were killed, South Africa stated before the Security Council that its action was justified by "terrorist violence emanating from Lesotho's territory" (provisional doc. A/PV.2639 of 30 December 1985, p. 12). We may also recall the incursions into Botswana, Zimbabwe, Zambia (19 May 1986), Swaziland (14 December 1986), Zambia (25 April 1987), Mozambique (28 May 1986), Botswana (28 March and 21 June 1988). See, Chronique des faits internationaux, in RGDIP, 1986, pp. 953-954; 1987, pp. 590, 1307-1308; 1988, pp. 678, 962.

It is quite clear that the acting States did not attempt to justify their violent actions as a matter of reprisals or countermeasures. They preferred resorting to a plea of self-defence, this concept being in their view applicable in the case of use of force to protect vital interests.

65. The tendency to broaden the scope of self-defence (namely of a reaction to an armed attack against a State) deserves further analysis especially with respect to armed intervention for reasons of humanity in a state of necessity. Actions of this nature are usually undertaken by a State for the protection of its nationals in situations of serious danger to life, regardless of the nature of the act or fact generating the danger, whether an internationally wrongful act of a State or the behaviour of private parties escaping the territorial State's control. The relevant practice includes the actions which Great Britain proposed to carry out in Iran (1946 and 1951), the Belgian intervention in the Congo (1960), the United States action in Santo Domingo (1965), the Mayaguez affair (1975), the Entebbe raid (1976), the Egyptian intervention in Larnaca (1978), the United States attempted rescue blitz in Iran (1980) and the United States interventions in Grenada (1983) and Panama (1989). 148/ On such occasions the acting States frequently resorted to the plea of self-defence as a justification for their action. 149/ In a few instances they referred to state of necessity. 150/

148/ On this practice N. RONZITTI, Rescuing Nationals, cit., pp. 21 ff., F. LATTANZI, Garanzie, cit., pp. 163 ff., and, more recently, A. SICILIANOS, Les réactions décentralisées, cit., pp. 449 ff. In particular, on the Belgian intervention in the Congo, see SCOR, 15th year, 879th meeting, 21/22 July 1960; on the United States action in the Dominican Republic see SCOR, 20th year, 1200th meeting, 5 May 1965, p. 5, para. 19; for the other cases cited, see the following notes. The protection of nationals in danger was also invoked as a justification, together with vital interests, for the British and French intervention in Egypt in 1956 (supra, para. 63. In the Grenada case the protection of nationals was only one of the various reasons invoked as justification (Doc. S/PV.2491, 27 October 1983, pp. 28 ff.). We will leave out here the cases where the acting State had also tried to secure, in one way or another, the consent of the territorial State (the validity of such consent being, however, questionable).

149/ See statements before the Security Council: - by the United States in the Panama case (S/PV.2902 of 23 December 1989, pp. 7 ff., especially p. 13); by the same State in the Mayaguez case (doc. S/11689. SCOR, 30th year, Supp. April-June 1975, p. 25); by Israel on the Entebbe raid (SCOR, 31st year, 1939th meeting, 9 July 1976, para. 115); by the United States on the Tabas raid (doc. S/13908, SCOR, 35th year, Supp. April-June 1980, p. 33)

150/ Statement by Belgium on the Congo intervention, in SCOR, 15th year, 879th meeting, 21/22 July 1960, p. 29, para. 151.

66. There are also instances of armed intervention to protect nationals of the territorial State itself. This seems to have been the case of the Arab States' intervention in Palestine in 1948, India's intervention in Bangladesh (1971), Viet Nam's intervention in Cambodia (1978) and Tanzania's intervention in Uganda (1979). 151/

67. The lawfulness of armed intervention to protect nationals in danger abroad generally appears to be accepted not so much under Article 51 (namely as a reaction to an armed attack against a State in the persons of its nationals or against the nationals of an ally of the intervening State) 152/ as on the basis of a plea of self-defence as understood in the practice of Anglo-Saxon countries, 153/ namely, of self-defence in a broad sense,

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151/ N. RONZITTI, Rescuing Nationals, cit., pp. 89 ff.; and A. SICILIANOS, Les réactions décentralisées, cit., pp. 166 ff. In addition to humanitarian reasons, the acting States also invoked self-defence. See, for instance, the Indian Government's position in the Bangladesh case (SCOR 26th year, 1606th meeting, 4 December 1971, p. 16, para; 160 ff.); Viet Nam's position on its intervention in Cambodia (SCOR, 34th year, 2109th meeting, 11 January 1979, p. 13, para. 126).

152/ In this sense, D. BOWETT, Self-defence, cit., pp. 91 ff. (but see also infra, note 33); id., The Use of Force for the Protection of Nationals Abroad, in A. CASSESE, ed., The Current Legal Regulation of the Use of Force, Dordrecht, 1986, pp. 40 ff.; A.J. THOMAS - A. THOMAS, The Dominican Republic Crisis 1965, The Hammarskjold Forum, 1967, pp. 13 ff.; E.V. ROSTOW, "The Politics of Force: Analysis and Prognosis", Yearbook of World Affairs, 1982, vol. 36, p. 50.

153/ In this sense, ROSS, A textbook of International Law, General Part, London, New York, Toronto, 1946, pp. 247 ff.; H. WALDOCK, The Regulation of the Use of Force by Individual States in International Law, 1952, II, Hague Rec., Vol. 81, p. 503 (who seems to speak of "self-protection"); G. FITZMAURICE, The General Principles of International Law Considered from the Standpoint of the Rule of Law, 1957, II, Hague Rec., Vol. 92, pp. 172-173; A. PANZERA, "Raids" e protezione dei cittadini all'estero, Rivista di Diritto Internazionale 1978, pp. 759 f. PILLITU, Lo Stato di necessità nel diritto internazionale, Perugia, 1981, especially pp. 263 ff.; N. RONZITTI, Rescuing Nationals, cit., pp. 52 ff., who believes that a customary rule is coming into being according to which these interventions would be lawful.

A contrary opinion (against the lawfulness of armed intervention in favour of nationals in danger abroad, subject to exception in case of the protection of human rights) is expressed by A. SICILIANOS, Les réactions décentralisées, cit., pp. 453 ff.; Th. SCHWEISFURTH, "Operations to Rescue Nationals in Third States Involving the Use of Force in Relation to the Protection of Human Rights", German Yearbook of International Law, 1980, pp. 159 ff.

inclusive of self-defence stricto sensu and necessity. 154/ Some evidence of this construction may possibly be inferred from the ICJ's dictum in the Hostages case with reference to the United States rescue operation. By condemning that action for the reason that it appeared to be incompatible with the respect due to the judicial process, 155/ the Court seems to have accepted by implication that the United States action might have been lawful if a judicial procedure had not been under way.

68. The justification of armed intervention for humanitarian purposes in favour of the nationals of the territorial State is more problematic. If a part (perhaps the majority) of the literature denies any justification for interventions of this kind 156/ on the basis of positions taken by Governments, 157/ another part of the doctrine considers this practice to be lawful, 158/ arguing inter alia on the basis of the work carried out by the ILC on draft Article 33 of Part One of this topic. 159/ For the time being,

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154/ Inter alios: J. WESTLAKE, International Law, Cambridge, 1901, vol. I, p. 299; P.Q. WRIGHT, "The Meaning of the Pact of Paris", AJIL, 1933, pp. 53 ff. and R. JENNINGS, "The Caroline and McLead Cases", ibid., pp. 83 ff. See also the doctrine cited by I. ZOUREK, "La notion de légitime défense en droit international, Rapport provisoire à l'Institut de droit international", in Annuaire, Session de Wiesbaden, 1975, p. 20; I. BROWNLIE, International Law and the Use of Force, cit., p. 43; P. LAMBERTI ZANARDI, La legittima difesa, cit., pp. 9 ff. In a partially different sense, D. BOWETT, Self-defence, cit., p. 89, who distinguishes "necessity" from "self-defence" including the defence of nationals abroad into the latter; and ROSS, A Textbook of International Law, cit., pp. 247 ff.

155/ ICJ Reports, 1980, p. 43, para. 93: "The Court therefore feels bound to observe that an operation undertaken in those circumstances, from whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations; and to recall that in paragraph 47, 1B, of its Order of 15 December 1979 the Court had indicated that no action was to be taken by either party which might aggravate the tension between the two countries".

156/ N. RONZITTI, Rescuing Nationals Abroad, cit., pp. 89 ff. and 108 ff., who also refers to the less recent literature. Uncertain appear to be I. BROWNLIE, International Law and the Use of Force, cit., pp. 341-342 and H. LAUTERPACHT, The International Protection of Human Rights, in Hague Rec., 1947, I, Vol. 70, pp. 5 ff.

157/ Ample study of this practice in N. RONZITTI, Rescuing Nationals, cit., p. 93 ff.

158/ On this point, see F. LATTANZI, Garanzie, cit., pp. 464 ff.

159/ See Report of the ILC, YBILC, 1980, vol. II, Part Two, pp. 34 ff., and R. AGO, Eighth Report on State Responsibility, YBILC, 1980, vol. II, Part One, pp. 14 ff.

we need not take a stand on this issue. We may have to deal more with the problem in relation to the consequences of the so-called international crimes of States. It is, however, indispensable for the present purposes to note that the said instances of armed humanitarian intervention - whether in favour of the intervening State's nationals or in favour of the nationals of the territorial State - consist of reactions to situations which, albeit difrerent from an armed attack, present a degree of emergency calling for immediate, direct armed action. They do not undermine, therefore, the prohibition of the use of force by way of countermeasure.

69. The conclusions reached so far find support in the Commission's comments on Article 30 of Part One of the project. In dealing with countermeasures as amongst the circumstances precluding wrongfulness, the Commission stated that "forms of reaction which were permissible under 'classical' international law, such as armed reprisals, are no longer tolerated in peace-time". 160/ This position was explicitly supported by different States during the discussion which took place in the Sixth Committee of the General Assembly. 161/

160/ Report of the International Law Commission, YBILC 1979, vol. II, Part Two, p. 115, para. 4.

161/ See the statements by Australia (doc. A/C.6/34/SR.47 para. 34); Egypt (doc. A/C.6/34/SR.51 para. 24); Kenya (doc. A/C.6/34/SR.43 para. 4); Mexico (doc. A/C.6/34/SR.41 para. 46), according to which the Commission should "consider the possibility of stipulating, in an additional paragraph, that Article 30 should not be interpreted as authorizing exceptions to the prohibition on the use of force other than those specified in the United Nations Charter". Professor Riphagen had not proposed a specific provision prohibiting armed reprisals, since he maintained that "all international obligations 'essential for the protection of fundamental interests of the international community' [among which Riphagen included the prohibition of armed force] or even all those obligations the breach of which, in isolation, is 'recognized as a crime', are immune under international law from being justifiably breached" (YBILC, 1980, vol. II, Part One, p. 127, para. 90). Notwithstanding these reflections, on other occasions States have within the Sixth Committee of the General Assembly called for a provision explicitly prohibiting armed reprisals: see for example the statements by Czechoslovakia (doc. A/C.6/39/SR.43, p. 8, para. 29), Sweden (doc. A/C.6/40/SR.28, p. 15, para. 66) and Algeria (doc. A/C.6/40/SR.31, p. 11, para. 48).

B. The problem of economic and political measures as forms of coercion

70. Our Third Report contains a brief outline of the different doctrinal opinions regarding the unlawfulness of certain economic and political countermeasures. 162/ In order to reach a conclusion on the possible restrictions to the admissibility of economic and political measures, it is now necessary to examine the practice of States.

71. It is well-known that during the San Francisco Conference the Latin-American States put forward a proposal that would have led to extend Article 2 paragraph 4 of the Charter to the condemnation of economic and political force. The proposal was defeated. 163/ This fact alone, however, is not sufficient to conclude that the majority of the States present at the Conference were categorically opposed to the prohibition of any actions of such nature. Opposition to the proposal might have been caused by its excessively broad definition of economic/political force. Moreover, the attitude of States may since then have changed (as did the composition of the United Nations membership). General Assembly resolutions and regional instruments are relevant for the issue.

72. General Assembly resolution 2131 (XX) of 1965 on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty clearly condemns the use of economic and political force. According to paragraph 1 of that resolution "all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements" - and not only armed intervention - are prohibited. The resolution continues by stating that "No State may use or encourage the use of economic, political or any type of measures to coerce another State to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind". 164/ Similarly, the Friendly Relations Declaration proclaims that "[n]o State may use or encourage the use of economical, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it

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162/ Third Report, cit., para. 101 ff.

163/ See Documents of the United Nations Conference on International Organization, San Francisco, 1945, London-New York 1945, Vol. 6, p. 559 for the text of the amendment proposed by Brazil, and pp. 334, 339-340 for the discussion at the Committee I/1 of 5 June 1945. The attempt by the Latin-American countries towards the prohibition of the use of non armed force has its origin at the end of last century within the context of the principle of non-intervention, but does not succeed in establishing itself in the same way as the prohibition of the use of military force. For a bibliography on the principle of non-intervention in the Americas, see Ch. ROUSSEAU, Droit international public, Vol. IV, Paris, 1980, p. 53 ff.

164/ General Assembly resolution 2131 (XX) of 21 December 1965 (109 in favour and one abstention).

advantages of any kind". 165/ It must be stressed that owing to the opposition of Western countries, the prohibition of intervention was not dealt with within the principle on the "prohibition of the threat or use of force in international relations". A further effort to link a condemnation of economic coercion to the prohibition of force in Article 2 paragraph 4 was carried out by Latin-American and Socialist Countries during the long "travaux préparatoires" of the resolution on the the Definition of Aggression. 166/ The 1974 resolution did not, however, consider economic coercion: the Special Committee on the definition declared that a provision in that sense would have been an obstacle to the adoption of the resolution by consensus. 167/ It is nevertheless interesting to note that the opposition had been mainly due to the extremely flexible formulation proposed. 168/ Prohibitions rather similar to the ones just recalled, are to be found in General Assembly resolutions concerning the permanent sovereignty over natural resources and the new international economic order. 169/ as well as other topics. 170/

165/ General Assembly resolution 2625 (XXV) of 24 October 1970.

166/ See the proposal put forward by Bolivia, according to which the "unilateral action whereby a State is deprived of its economic resources derived from the proper conduct of international trade or its basic economy is endangered so that its security is affected and it is unable to act in its own defence or to cooperate in the collective defence of peace" should have been considered a form of aggression (Doc. A/AC.66/L/9 (1953)).

167/ General Assembly resolution 3314 (XXIX) (1974). Here again the Western States opposed an express provision on economic coercion.

168/ Statement by Fitzmaurice, in GAOR, 7th Session, Annexes, Agenda Item 54, p 74.

169/ See, for example, General Assembly resolution 1903 (XVII) of 14 December 1962, Permanent Sovereignty over Natural Resources; General Assembly resolution 3016 (XXVII) of 18 December 1972, Permanent Sovereignty over Natural Resources of Developing Countries; General Assembly resolution 3281 (XXIX) of 12 December 1974, Charter of Economic Rights and Duties of States; General Assembly resolution 3201 (S-VII) of 1 May 1974, Declaration on the Establishment of a New International Economic Order. On this point see G. ARANGIO-RUIZ, Human Rights and Non-Intervention in the Helsinki Final Act, Hague Rec., Vol. 157, 1977-III, pp. 272 ff.

170/ See General Assembly resolution 2160 (XXI) of 30 November 1966, Strict Observance of the Prohibition of the Threat or Use of Force in International Relations and of the Right of Peoples to Self-Determination; and, more recently, General Assembly resolution 49/185 of 17 December 1985, Economic Measures as a Means of Political and Economic Coercion Against Developing Countries (in which the General Assembly "[r]eaffirms that developed countries should refrain from threatening or applying trade restrictions, blockades, embargoes and other economic sanctions, incompatible with the provisions of the Charter of the United Nations and in violation of undertakings contracted, multilaterally and bilaterally, against developing countries as a form of political and economic coercion which affects their economic, political and social development").

73. On a regional scale mention must be made of the Bogota Charter establishing the Organization of American States (OAS) (1948), which notoriously formulates the principle of non-intervention expressed in the very broad terms which were later to appear in General Assembly resolutions 2131 (XX) and 2625 (XXV), 171/ including the prohibition of the "use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind" (Article 19 of the Part). A formally non-binding but none the less very significant instrument containing a similar prohibition is the Helsinki Final Act of 1975. Here also the prohibition is expressed in the same terms of the cited General Assembly resolutions and under the specific title of non-intervention. 172/

74. All the said instruments condemn resort to economic/political coercion when it infringes the principle of non-intervention. 173/ Armed and non-armed frocible measures are thus subject to different regimes. The prohibition of armed coercion being general, armed countermeasures are unlawful in any case. The prohibition of economic/political coercion only covers non-armed measures aimed at specifically condemnable ends such as the "subordination of the exercise of [the target State's] sovereign rights", or the effort to secure "advantages of any kind". 174/ Clearly, the condemnation of non-armed coercion only covers those measures of an economic/political nature which are apt to result in very seriously if not catastrophically disruptive consequences for the State against which they are taken.

171/ Article 18 forbids "to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State" and therefore forbids "not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economical and cultural elements".

172/ Act of 1 August 1975, principle VI according to which States will "in all circumstances refrain from any other act of military, or political, economic or other coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantages of any kind". See G. ARANGIO-RUIZ, Human Rights and Non-Intervention, cit., pp. 274 ff.

173/ In this sense, the International Court of Justice acknowledged the unlawfulness of economic measures only in the context of the principle of non-intervention in the case concerning Military and Paramilitary Activities in and against Nicaragua (ICJ Reports, 1986, p. 108 ff., para. 126).

174/ It is true that this perspective does not imply consequences which are any different from the economic/political measures considered unlawful with respect to those including the use of armed force: and this has led to the conclusion that the effort to distinguish the two hypotheses in a practical, meaningful way has failed. In this sense, with regard to the General Assembly resolution of 1970 on "Friendly Relations", see G. ARANGIO-RUIZ, The Normative Role of the General Assembly , cit., pp. 528-530.

75. This conclusion is supported by other elements of State practice. While economic measures are very frequently resorted to, the complaints of States frequently targeted by economic measures have not been related so much to the nature of the action per se, but rather to the circumstance that the action amounted to an "economic strangulation" or produced otherwise catastrophic effects. In providing a few examples, we do not intend to discuss the merits of the cases with regard to the lawfulness of the measures adopted.

76. Significant - although the actions involved did not qualify as countermeasures proper 175/ - are the positions taken by Bolivia with regard to the sea-dumping of tin by the Soviet Union in 1958; 176/ and by Cuba with regard to the drastic reduction of United States sugar imports in 1960. 177/ Also interesting are the complaints of some Latin-American States, including Argentina, 178/ which alleged (before the Security Council) the unlawfulness of the trade sanctions resorted to by Western countries following the outbreak of the Falkland/Malvinas crisis. The said Latin American States qualified the measures in question as acts of "economic aggression carried out in blatant violation of international law". 179/ The Soviet Union accused the

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175/ It is not clear whether the State adopting the measure was reacting against a prior unlawful act. However, even if a prior unlawful act was missing, the statements referred to appear to be relevant, because they highlight the conditions under which the use of economic force is considered unlawful. One must also bear in mind that in economic matters the border between retorsion and reprisal is not always easily ascertainable, as the rights and duties are usually conventional and their interpretation is often debated.

176/ Quoted in McDOUGAL-FELICIANO, Law and Minimum World Public Order - The Legal Regulation of International Coercion, New Haven and London, 1961, p. 194, note 165.

177/ AJIL, vol. 55, 1961, pp. 822 ff. Cuba qualified this action as a "constant aggression for political purposes against the fundamental interests of the Cuban economy" (ibid., p. 822).

178/ The official position of Argentina was made clear to the Italian Government in a document prepared by the Argentinian Embassy in Rome on 14 April 1982 ("Reazioni del Governo argentino sulle misure restrittive adottate dalla CEE sull'importazione di suoi prodotti", quoted in A. De GUTTRY, Le contromisure adottate nei confronti dall'Argentina da parte delle Comunità europee e dei terzi Stati ed il problema della loro liceità internazionale, in N.- RONZITTI (ed.), La questione delle Falkland-Malvinas nel diritto internazionale, Milano 1984, p. 357). According to Argentina, the measures adopted by the EEC would amount to an economic aggression openly violating the principles of international law and the law of the United Nations.

179/ Statement by Venezuela, in S/PV.2362, 22 May 1982, pp. 23-25; see also the statements by El Salvador, in S/PV.2363, 23 May 1982, p. 47; Nicaragua, ibid.; Ecuador, in S/PV.2360, 21 May 1982, p. 71.

United States of "using trade as a weapon against our country" with regard to the measures adopted following the Polish crisis in 1981-1982. 180/ In this case the United States maintained that it was not seeking "to bring the Soviet Union to its knees economically". 181/ The United States, which is traditionally opposed to a broad interpretation of Article 2 paragraph 4, declared during the debates in the Committee on the Strengthening of the Prohibition of Force that the pressure exercised by the Soviet Union on Poland, which led to the declaration of martial law in the latter country, was precisely a case of unlawful resort to force. 182/ The concept of economic coercion used in order to influence another country's conduct has also been resorted to by some States in order to qualify the measures adopted by South Africa towards neighbouring countries, allegedly in violation of international law - according to South Africa - for giving shelter to ANC members. 183/ One should finally recall some of the official comments by States on the ILC project of a Code of Crimes against the Peace and Security of Mankind. A number of States, while not always clearly distinguishing between crimes of States and crimes of individuals, have stated that the Commission should bear in mind that economic measures could in some instances amount to an aggression. 184/

77. To conclude, it is quite obvious that a great variety of forms of economic or political reaction are frequently resorted to and are considered perfectly admissible as countermeasures against internationally wrongful acts. 185/ Their admissibility, however, is not totally exempt from

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180/ Statement of the USSR Minister of Foreign Trade, in Financial Times, 17 November 1982, p. 1.

181/ Statement by Thomas N.T. Niles, Deputy Assistant Secretary, in Hearing before the Subcommittee on Europe and the Middle East of the Committee on Foreign Affairs, House of Representatives, 97th Congress, Second session, 10 August 1982, Washington, 1982, p. 8.

182/ As everybody knows, these pressures did not arrive at an open military action. Doc. A/37/41, para. 50.

183/ See the statements by Yugoslavia, Madagascar and Thailand, in S/PV.2660, 12 February 1986, p. 13 ff., 28 ff., 38 ff.

184/ See the statements by the Soviet Union, doc. A/C.6/39/SR.33, p. 12; Sierra Leone, doc. A/C.6/40/SR.23, p. 19; Suriname, doc. A/C.6/40/SR.34, p. 26.

185/ The admissibility of economic countermeasures has been already maintained by this Commission. In the comment to Art. 30 of the first part of the present project, the Commission stated "that modern international law does not normally place any obstacles of principle in the way of the application of certain forms of reaction to an internationally wrongful act (economic reprisals, for example)" (YBILC, 1979, vol. II (Part Two), p. 116, para. 5 (emphasis added)).

restriction. Although the State practice considered does not appear to warrant the conclusion that certain forms of economic and/or political coercion are equivalent to forms of armed aggression, the said practice none the less reveals a trend towards the prohibition of economic/political measures jeopardizing the territorial integrity or the political independence of the State against which they are taken. 186/

C. Countermeasures and Respect for Human Rights

78. Although originally confined to belligerent reprisals, humanitarian limitations to the right of unilateral reaction to internationally wrongful acts have acquired in our time, thanks to the unprecedented development of the law of human rights, a degree of restrictive impact which is second only to the condemnation of the use of force. 187/ It is nevertheless much more difficult to determine the precise extent of humanitarian restrictions.

79. The practice considered in our Third Report may be usefully supplemented by a few recent cases which support the unanimous attitude of writers. During the Falkland-Malvinas crisis, the United Kingdom froze Argentinian assets in the country, but with the specific exception of the funds which would normally be necessary for "living, medical, educational and similar expenses of residents of the Argentine Republic in the United Kingdom" and for "payments to meet travel expenditure by residents of the Argentine Republic leaving the United Kingdom". 188/ In declaring, in 1986, a total blockade of trade

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186/ See for example, the statement of the Ethiopian representative in the Sixth Committee on Article 30 of Part One of this project, according to which Article 30 deserved more study with regard to economic measures "in view of the possibility that economically strong States could use the rule to the detriment of weaker States under the pretext of legitimate countermeasures" (doc. A/C.6/34/SR.43, p. 19).

187/ The development of humanitarian limitations to the right of adopting reprisals is thoroughly illustrated by F. LATTANZI, Garanzie, cit., pp. 295-302.

188/ Notice of the Bank of England issued on 3 April 1982, in BYIL, vol. 53, 1982, p. 509 ff., at 511.

relations with Libya by way of countermeasures, the United States prohibited the export "to Libya of any goods, technology (including technical data or other information) or services from the United States except publications and donations of articles intended to relieve human suffering, such as food, clothing, medicine, and medical supplies intended strictly for medical purposes". 189/ Following the murder of an Italian researcher in Somalia, the Foreign Affairs Committee of the Italian Parliament approved, on 1 August 1990, the suspension of any activities in Somalia "not directly finalized to humanitarian assistance". 190/ It is, on the other hand, well-known that in cases such as those just described, reprisals proper are

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189/ AJIL, vol. 80, 1986, p. 630. A very similar provision is contained in Executive Order No. 12722, with which the United States took measures against Iraq following the invasion of Kuwait (text in AJIL, vol. 84, 1990, p. 903, particularly Section 2 (b)). In less recent years, we should recall the so-called "Martens Clause" as provided for in No. 8 of the Preamble of IV Hague Convention of 18 October 1907, which reads "[l]es Hautes Parties contractantes jugent opportun de constater que, dans les cas non compris par les dispositions réglementaires adoptées par elles, les populations et les belligérants restent sous la sauvegarde et sous l'empire des principes du droit des gens, tels qu'ils résultent des usages établis entre nations civiliséed, des lois de l'humanité et des exigences de la conscience publique". This provision testifies the existence of a core of lois de l'humanité which constitutes a limitation to the activities of war carried out by the Parties. It is noteworthy, as a further example, that in a speech to the National Assembly held on 13 December 1949, French Foreign Affairs Minister Robert Schuman, maintained, with regard to a dispute arosen with Poland, that the French Government "ne pouvait pas penser que, dans un pays démocratique, les autorités eussent le droit d'arrêter des ressortissants étrangers sans aucun motif et sans qu'aucun chef d'inculpation soit retenu contre eux, simplement pour faire pression sur un autre gouvernement (in A. KISS, Répertoire, cit., vol. VI, No. 22, p. 16). With regard to the Genocide Convention, Sir Hartley Shawcross representing the United Kingdom before the International Court of Justice in 1951 declared that "[t]he Convention ... contain[s] absolute obligations, not subject to any consideration of reciprocity at all" (ICJ, Pleadings, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951, p. 388). Furthermore, following the killing of 85 young people on 15 May 1979, at Bangui, by the personal security forces of Bokassa, ruler of the Central-African Republic, France in retaliation suspended a financial cooperation agreement with that country, but excluded from this measure the suspension of financial assistance in the fields of education, food and medicine (in Rousseau, Chronique, RGDIP, 1980, p. 364).

190/ La Repubblica, 2 August 1990, p. 14.

frequently combined, by the acting State, with merely retaliatory measures (retorsion), the distinction between the two being not always apparent. A rigorous distinction, however, does not appear to be indispensable. The fact that humanitarian restrictions are taken into account by States even in applying measures of mere retorsion (in view of the fact that they consider the interest infringed not to be legally protected) makes the restriction for humanitarian reasons even more significant than it would be if it were limited to reprisals proper.

80. As regards the sphere of humanitarian interests with regard to which the restriction is to operate, indications can be drawn from the relevant international instruments. Both the International Covenant on Civil and Political Rights and the European Convention on Human Rights envisage the possibility that the application of most of their rules be suspended in case of "public emergency which threatens the life of the nation". 191/ The possibility of suspension is, however, excluded, according to the Covenant, for the right to life (Art. 6), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (Art. 7), the right not to be held in slavery or in servitude (Art. 8), the right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation (Art. 11), the right expressed by the principle nulla poena sine lege (Art. 15), the right to recognition as a person before the law (Art. 16), and the right to freedom of thought, conscience and religion (Art. 18). 192/ Also the literature on the subject is useful for the purpose of identifying those which are usually considered to be the "most essential" among human rights. According to Buergenthal "an international consensus on core rights is to be found in the concept of "gross violations of human rights and in the roster of rights subsumed under it. That is to say, agreement today exists that genocide, apartheid, torture, mass killings and massive arbitrary deprivations of liberty are gross violations". 193/ In El Kouhene's opinion there is a "minimum irréductible des droits de la personne humaine" which comprises at least the right to life, the right not to be subjected to torture or degrading treatment and the right not to be reduced to slavery or servitude. 194/ Medina-Quiroga also believes that some human rights qualify as "core rights"

191/ International Covenant on Civil and Political Rights, Article 4.

192/ On conventionally inderogable rights, see F. LATTANZI, Garanzie, cit., pp. 15 ff.

193/ Th. BUERGENTHAL, Codification and Implementation of International Human Rights, in Human Dignity. The Internazionalization of Human Rights, A. Henkin editor, Aspen Institute for Humanistic Studies, New York, 1979, p. 17.

194/ EL KOUHENE, Les garanties fondamentales de la personne en droit humanitaire et droits de l'homme, Dordrecht-Boston-Lancaster, 1986, p. 109.

or "basic rights"; 195/ and Meron does not exclude the possibility of distinguishing various categories of human rights, although he warns that "... except in a few cases (e.g. the right to life or to freedom from torture), to choose which rights are more important than others is exceedingly difficult". 196/ It would actually seem that the most essential among human rights ("core rights" or minimum irréductible) are those the promotion and respect of which would have become the object of customary international law. 197/

81. We do not believe, however, that the draft articles themselves should contain any enumeration of the human rights considered to be the most "essential" and therefore immune from countermeaures or the effects thereof. Any enumeration would "crystallize" a rule that must be left open to the evolution of the law of human rights.

195/ C. MEDINA QUIROGA, The Battle of Human Rights. Gross, Systematic Violations and the Inter-American System, Dordrecht-Boston-London, p. 13.

196/ T. MERON, "On a hierarchy of international human rights", AJIL, vol. 80, 1986, p. 4.

197/ For instance, the customary nature of the prohibition of torture is maintained, inter alios, by the IDI rapporteur (Cambridge session on extradition, K. DOEHRING, Annuaire de l'IDI, V. 60-II, 1983, p. 253) as well as by R. Lillich (Civil Rights, in Human Rights in International Law, T. Meron editor, V. I, p. 127), P. Sieghart (The Lawful Rights of Mankind, p. 60), by T. Meron (Humanitarian Law and Human Rights as Customary International Law, 1989, pp. 95-6), by Burgers and Danelius (The United Nations Convention against Torture, 1988, p. 1) and in the Restatement of the Law Third, (Restatement of the Foreign Relations Law of the United States, Section 702). The view that the prohibition of torture is a matter of jus cogens is put forward by Y. Dinstein (The International Bill of Rights, Henkin editor, p. 122), by F.A. O'Boyle ("Torture and Emergency Powers Under European Convention on Human Rights: Ireland v. the United Kingdom", AJIL, vol. 71, 1977, p. 687) and by A. Migliazza (Réglementation de la guerre et droits de l'homme, in RdCADI, 1972-III, p. 190). On the qualification of the right not to be subjected to torture as a most "essential" human right and on the prohibition of torture by a norm of general international law, see A. MARCHESI, La tortura e i trattamenti crudeli, inumani e degradanti nel diritto internazionale (doctoral thesis), European University Institute, Florence, 1991, Chapter IV.

82. We must now turn to consider whether any other human rights, among those usually not included in the group of so-called "core rights", and therefore qualifiable - in a sense - as less "essential", should also be kept immune from countermeasures. 198/ A part of the doctrine is of the opinion that the restriction in question would apply not only to the treaties and rules on human rights or to the rules of the humanitarian law of armed conflict but to any rules intended in any way to protect human beings. It would follow that an injured State could not suspend, by way of countermeasure, forms of assistance aimed at improving the condition of the law-breaking State's population. 199/ According to this opinion any obligation concerning, inter alia, development cooperation should not be infringed by way of countermeasure. Such an extensive notion of the humanitarian restriction is not, however, shared by a significant number of writers nor is it sufficiently supported by practice. Furthermore, its acceptance within the framework of the project on State responsibility appears to be in contrast with what we believe to be the need for an overall balance between, on the one hand, the introduction of indispensable restrictions to countermeasures and, on the other hand, the necessity not to deprive States of the possibility to react to breaches of international obligations.

83. Suggestions aimed at extending the scope of the restriction to resort to countermeasures infringing human rights have included a proposal to render immune from lawful measures the property rights of foreign nationals. 200/ In our understanding, the human rights which should be considered inviolable by

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198/ An entirely different question is the one concerning possible restrictions to countermeasures presently deriving from multilateral treaty norms concerning specific human rights which are not included in what has been referred to as "le minimum irréductible". The violation, by way of countermeasure, of the said norms, which establish obligations which qualify as erga omnes obligations within the framework of the treaty, would consist in a violation of the right not only of the State alleged to have committed the wrongful act against which the measure is adopted, but also of the other States parties to the treaty. This, however, is a feature which is not unique to human rights norms, but rather concerns all norms establishing indivisible obligations, and will therefore be dealt with separately, infra, paras. 92-95. In the light of this clarification we do not consider draft Article 11.1 (c), as proposed by our predecessor, to be entirely satisfactory, in so far as it appears to consider the humanitarian restriction to the right to adopt countermeasures only within the context of multilateral treaty norms.

199/ See, for example, A. CASSESE, Il diritto internazionale nel mondo contemporaneo, Bologna, 1984, p. 271.

200/ Third Report, cit., paras. 111-112.

way of countermeasure - the more "essential" human rights - do not include property rights. Recent State practice presents not only cases of expropriation of foreign property by way of countermeasure but also, and rather frequently, cases where the assets of foreign nationals have been "frozen" by way of reaction to a prior allegedly wrongful act by their State. 201/ We therefore do not consider that the provision concerning humanitarian restrictions should either explicitly include or be read as referring to property rights. This obviously does not imply that restrictions to countermeasures in the area of property rights (and especially to countermeasures of a definitive nature) may not be the result of the operation of different rules (such as the general rule of proportionality).

D. The question of the inviolability of diplomats and other specially protected persons

84. The main doctrinal positions on this problem and the position of our predecessor as reflected in his draft article 12 (a) are summarized in our Third Report. 202/ During the thirty-seventh session the members of the Commission expressed a variety of views on this point. Some favoured the proposed draft article 12 paragraph (a), 203/ while others suggested a broadening of its scope. 204/ A third group of members thought the limitation to be totally unjustified, 205/ while a fourth group expressed the view that the limitation in question should only apply to a small number of diplomatic immunities. 206/

85. The recent practice, from which we hoped to draw more significant if not decisive indications, actually appears to be scarce of cases of non-compliance, by way of countermeasures, with obligations affecting the treatment of

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201/ The said practice is referred to, passim, throughout the present Report. See, for example, supra, document A/CN.4/444, Chapter 1, note 7.

202/ Third Report, cit., paras. 114 ff.

203/ Calero Rodrigues (YILC, 1985, vol. I, 1892nd meeting, para. 39), Razafindralambo (ibid., 1898th meeting, para. 21), Lacleta Munoz (ibid., 1899th meeting, para. 28) and Barboza (ibid., 1897th meeting, para. 30).

204/ Flitan (YILC, 1985, vol. I, 1893rd meeting, para. 10), Balanda (ibid., 1894th meeting, para. 44) and Yankov (ibid., 1899th meeting, para. 41).

205/ Sinclair (YILC, 1985, vol. I, 1895th meeting, para. 7), Njenga (ibid., 1896th meeting, para. 28) and Sucharitkul (ibid., 1891st meeting, para. 41).

206/ Tomuschat (YILC, 1985, vol. I, 1896th meeting, para. 41), Al Qaysi (ibid., 1899th meeting, para. 18), Arangio-Ruiz (ibid., 1900th meeting, para. 21) and Jagota (ibid., 1901st meeting, para. 13).

diplomatic envoys. 207/ For example, in 1966 Ghana arrested the members of the delegation of Guinea to the O.A.U. Conference, including the foreign Minister. The arrest, which took place on board an aircraft of an American airline in transit at Accra, was justified by the Government of Ghana as a means to secure reparation for a number of wrongful acts committed by Guinea, including a raid in the premises of the Ghanean Embassy at Conakry and the arrest of the Ambassador with his wife. 208/ Another example is the arrest by Ivory Coast authorities, in 1967, of the Foreign Minister of Guinea and the Guinean Permanent Representative to the United Nations during a forced interruption of their flight to Guinea. The Ivory Coast Foreign Minister stated that "This arrest ... is a consequence of the arbitrary detention of several Ivory Coast nationals in the Republic of Guinea, and the Ivory Coast keenly regrets being obliged ... to detain the group of Guineans on Ivory Coast soil until the release of Ivory Coast nationals". 209/

86. As regards the foundation of the limitation we are inclined to believe that it is to be found in the very raison d'être of the rules on diplomatic relations. The ratio of the immunity of diplomatic envoys from countermeasures may, in other words, be identified with the "great importance attached to unhindered international communication". Riphagen, on his part, referred to the concept of a "self-contained régime", implying that the only lawful forms of countermeasure would be those envisaged by the régime itself. 210/ He thus seemed to share the position expressed by the ICJ in the Hostages case, according to which "[t]he rules of diplomatic law, in short, constitute a self-contained régime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse". 211/ This dictum was rightly found to be lacking in precision. 212/

207/ For the relatively less recent practice it should be recalled that the necessity of preserving diplomatic relations at all costs was repeatedly emphasized in the course of the debates on the amendment of Article 16 of the League of Nations Covenant with regard to the regulation of economic measures as sanctions against aggression (League of Nations, Report and Resolutions, cit., p. 11 ff.)

208/ KEESING's, cit., pp. 21738-40.

209/ SCOR, 22th year, Supp. for July-August and September 1967, Annex IV, p. 176.

210/ Our predecessor's opinion is recalled in para. 115 and note 222 of our Third Report.

211/ ICJ Reports, 1980, p. 3 at p. 40, para. 86.

212/ Röling, already quoted in, Third report, cit., para. 115, note 220. The same view seems to be shared by Dominicé (ibid.)

87. Our submission is that the ratio of any restriction in the faculté of countermeasures affectng diplomatic envoys can only be that of securing the normal channels of communication among States (ne impediatur legatio). Surely, the possibility of effective, continued communication is a most essential requirement of international relations in times of crisis as well as under normal conditions. It is precisely from the identification of this element that the Commission should in our view try to determine the impact of the restriction in question. We consider it to be indeed evident that the obligations that should not be infringed by way of countermeasures could not be indistinctly all the international obligations deriving from the rules of diplomatic law but only those compliance with which is essential for the preservation of the normal operation of the channels of diplomacy.

88. One may, of course, wonder whether any restriction of the faculté of countermeasures in the area of diplomatic relations may not have been absorbed by restrictions of a different nature such as those relating to the protection of human rights, on the one hand, and, whenever they do not overlap with the latter, those deriving from peremptory rules, on the other hand. Some of the most essential rules affecting specially protected persons overlap with rules protecting human rights in general, particularly with any such rules of a cogent character. It seems reasonable to think, however, that the rules on the inviolability of diplomatic envoys (and other protected persons) have a specific raison d'être of their own. They have actually come into existence long before the rules on the protection of human rights and the rules of jus cogens. It seems therefore correct to maintain the specific corresponding restriction of the faculté of adopting countermeasures, at least as a residual limit.

E. The relevance of jus cogens and erga omnes obligations

89. We have thus identified the restrictions to the lawfulness of countermeasures deriving from the prohibition of the use of armed force and of any economic or political coercion which endangers the territorial integrity or the political independence of the State against which it is exerted, from the inviolability of fundamental human rights and from norms aimed at ensuring the "normal processes of bilateral or multilateral diplomacy". It seems unnecessary at this point to elaborate at any length on the existence of that other general restriction which derives from the legal necessity to comply with any peremptory rule of general international law. 213/

90. It is indispensable to recall, on the other hand, that the Commission has implicitly recognized the existence of the restriction in question. It has done so in Part One of the project: firstly, by including among the circumstances precluding wrongfulness the fact that "the act constitutes a measure legitimate under international law ... in consequence of an internationally wrongful act" (Article 30); 214/ secondly, when it has stressed

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213/ See on this point, Third Report, cit., paras. 118-120.

214/ See, Third Report, cit., para. 120.

the inviolability of peremptory norms even when there is the consent of the State in favour of which the infringed obligation exists (Article 29, para. 2); and thirdly, in case of a state of necessity (Article 33, para. 2 (a)). The special attention thus paid by the Commission to the norms in question confirms the conclusion clearly emerging from the adoption, by a large majority, of Articles 53 and 64 of the Vienna Convention on the Law of Treaties, 215/ namely that "the very existence of such a category of norms implies that there is a general interest in international society that they should be respected as much as possible". 216/ We deem it therefore appropriate to include in the project a provision analogous to the one proposed by our predecessor in draft article 12 (b) 217/ prohibiting resort to any countermeasure which is "inconsistent with a peremptory rule of general international law". One cannot but agree with those who believe that "it would be illogical ... at the same time [to] admit that the breach of an obligation imposed by a peremptory norm is justified only because another State had previously violated an international obligation". 218/

91. Considering the object of some of the restrictions described in the previous sections of this Chapter (such as, for example, the prohibition of resort to armed force and the obligation to respect fundamental human rights), a provision concerning the jus cogens restriction would presumably end up by covering hypotheses covered by the said restrictions. However, not all the limits referred to in the preceding sections may be considered as deriving from rules of jus cogens; nor, vice versa, is the jus cogens limit exhausted by the specific restrictions envisaged so far. On the one hand, the jus cogens restriction already covers subject-matters not included in the said

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215/ Article 53 (adopted with 87 votes in favour, 8 against and 12 abstentions): "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"; Article 64 (adopted with 84 votes in favour, 8 against and 16 abstentions): "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates". See, on the point United Nations Conference on the Law of Treaties, second section, official records, pp. 107-125.

216/ G. Gaja, Jus Cogens Beyond the Vienna Convention, Hague Rec., 1981-III, p. 297.

217/ W. Riphagen, Sixth Report on State Responsibility. YBILC 1985, II, Part One, Article 12 and the comment thereto.

218/ G. Gaja, cit., p. 217. On this point see also, Third Report, cit., para. 119.

specific restrictions (we think, for example, of the prohibition of countermeasures deriving from the peremptory rule on self-determination of peoples). On the other hand, in view of its historically relative nature, the jus cogens restriction could extend, reduce, or modify its scope in the course of time. In order to complete the picture of the restrictions, it is therefore necessary to adopt ad hoc provisions relating to each of the "substantive limitations" considered in the preceding sections as well as one on the general limit deriving from jus cogens.

92. For a number of reasons the project should include, in addition to the restriction to countermeasures deriving from jus cogens, a further restriction based on the erga omnes structure of certain international legal obligations. 219/ It is well-known - and will be further explained later 220/ - that the concept of erga omnes obligation is not characterized by the importance of the interest protected by the norm - this aspect being typical of jus cogens - but rather by the "legal indivisibility" of the content of the obligation, namely by the fact that the rule in question provides for obligations which bind simultaneously each and every addressee State with respect to all the others. This legal structure is typical not only of peremptory norms, but also of other norms of general international law and of a number of multilateral treaty rules (erga omnes partes obligations). 221/

93. The consequence of the said structure (of erga omnes rules) with regard to the regime of unilateral reactions to internationally wrongful acts is that any measure adopted by a State vis-à-vis a law-breaking State infringes not only the right of the latter but also the rights of all the other addressees of the infringed (erga omnes) rule. This inequitable consequence was expressly envisaged, for example, in the course of the debates on what was to become Article 60 of the Vienna Convention on the Law of Treaties. Paragraph 5 of that Article does not allow the termination or suspension of conventional provisions relating to the protection of the human person contained in treaties of a humanitarian character. During the travaux préparatoires, while some States declared that this hypothesis was already covered by Articles 43 (Obligations imposed by international law independently of a treaty) and 53 (Treaties conflicting with a peremptory norm of general international law), the prevailing opinion was that the exception

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219/ On the point, see, Third Report, cit., para. 121.

220/ See the Second Addendum to our Fourth Report on State Responsibility United Nations document A/CN.4/444.

221/ Third Report, cit., para. 921, and the Second Addendum to our Fourth Report on State Responsibility, United Nations document A/CN.4/444.

to the normal rules on termination and suspension of treaties on humanitarian grounds was connected with the erga omnes structure of the rules in question. 222/

94. The problem of restricting countermeasures infringing erga omnes obligations was considered by our distinguished predecessor. He did so in the paragraphs 1 (a) and (b) and 2 of draft article 11. According to these provisions:

> "1. The injured State is not entitled to suspend the performance of its obligations towards the State which has committed the internationally wrongful act to the extent that such obligations are stipulated in a multilateral treaty to which both States are parties and it is established that:
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> "(a) the failure to perform such obligations by one State party necessarily affects the exercise of the rights of the performance of obligations of all other States parties to the treaty; or
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> "(b) such obligations are stipulated for the protection of collective interests of the States parties to the multilateral treaty;
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> ...
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> "2. The injured State is not entitled to suspend the performance of its obligations towards the State which has committed the internationally wrongful act if the multilateral treaty imposing the obligations provides for a procedure of collective decisions for the purpose of enforcement of the obligations imposed by it, unless and until such collective decision, including the suspension of obligations towards the State which has committed the internationally wrongful act, has been taken; in such case, paragraph 1 (a) and (b) do not apply to the extent that such decision so determines." 223/

222/ Document A/CONF.39/11, p. 352 ff., and document A/CONF.39/11/Add.1, p. 111 ff. The provision goes back to a Swiss proposal and was based on the International Red Cross concern that non-compliance with the Geneva Conventions and Protocols on humanitarian law of armed conflicts be excluded. This explains the reference in the article to treaties on humanitarian law. But the reasons given for the inclusion of such a provision in Article 60 indicate that it was not the subject-matter (humanitarian law), but the structure of the rules in question to be most relevant.

223/ W. Riphagen, Sixth Report, cit., article 11 and comment thereto.

95. While agreeing with the previous Rapporteur on the need to include, at least by way of progressive development and for the protection of "innocent" States, 224/ a provision forbidding countermeasures in violation of erga omnes obligations, we feel, however, that paragraphs 1 (a) and (b) and 2 of draft article 11 do not provide a satisfactory solution. Apart from the unclear distinction between the three hypotheses covered by the quoted paragraphs - which hypotheses, in our view, overlap in many respects - the provisions in question only consider erga omnes obligations provided for in multilateral treaties. They ignore those erga omnes obligations - presently in existence and subject to further development in the future - which do not attain the rank of peremptory norms but derive from norms of general, customary or unwritten law. 225/ We therefore believe that the provision on the inadmissibility of measures in violation of erga omnes obligations - or, in all events, of the rights of States other than the law-breaking State - should be drafted in such terms as to cover all erga omnes obligations, whether conventional or customary.

224/ It is useful to recall that the ILI, already in 1934, had suggested, in its well-known resolution on "le régime des représsailles en temps de paix", to "limiter les effets des représailles à l'Etat contre qui elles sont dirigées, en respectant, dans toute la mesure possible, tant les droits des particuliers, que ce des Etats tiers" (Annuaire IDI, vol. 38, 1934, p. 709).

225/ See the Second Addendum to our Fourth Report on State Responsibility, United Nations document A/CN.4/444.

CHAPTER VI. PROPOSED DRAFT ARTICLES

96. The following are the draft articles proposed by the Special Rapporteur:

Article 13

Proportionality

Any measure taken by an injured State under Articles 11 and 12 shall not be out of proportion to the gravity of the internationally wrongful act and of the effects thereof.

Article 14

Prohibited countermeasures

An injured State shall not resort, by way of countermeasure to:

(a) the threat or use of armed force in breach of the United Nations Charter;

(b) any other conduct susceptible of endangering the territorial integrity or political independence of the State against which it is taken;

(c) any conduct which:

(i) is not in conformity with the rules of international law on the protection of fundamental human rights;

(ii) is of serious prejudice to the normal operation of bilateral or multilateral diplomacy;

(iii) is contrary to a peremptory norm of general international law;

(iv) consists of a breach of an obligation towards any State other than the State which has committed the internationally wrongful act.